RECORD OF TRIAL

(and accompanying papers)

of

OMAR AHMED KHADR
also known as AKHBAR FARHAD,
AKHBAR FARNAD,
and AHMED MUHAMMED KHALI

Name and any aliases charged

0766

Identification Number

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office Military Commissions
(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba on Motions Session 4- 8 Feb 2008 -- Vol II

(place or Places of Trial) *(Date or Dates of Trial)*

Companion cases:
None.

Filings Inventory – US v. Khadr

As of 1600, 29 January 2008

This Filings Inventory includes only those matters filed since 1 March 2007.

Dates in red indicate due dates

Prosecution (P Designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
P 001: Motion to Reconsider (Dismissal Order)				• See Inactive Section	
P 002: MCRE 505 Review Request				• See Inactive Section	
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				•	

Defense (D Designations)

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion to Vacate, or Alternately , for Continuance				• See Inactive Section	
D 002: Motion for Abeyance of Proceedings				• See Inactive Section	
D 003: Motion for Continuance				• See Inactive Section	
D 004: Motion for Proper Status Determination				• See Inactive Section	
D 005: Motion for Continuance				• See Inactive Section	
D 006: Defense Special Request for Deposition of FBI Witness				• See Inactive Section	
D 007: Defense Request for Continuance for Submission of All Law Motions				• See Inactive Section	
D 008: Defense Motion to Dismiss Charge I	7 Dec 07	14 Dec 07	19Dec 07	• Motion Filed • A. Pros Response • B. Def Reply	OR - XXX
D 009: Defense Motion to Dismiss Charge II	7 Dec 07	14 Dec 07	19 Dec 07	• Motion Filed • A. Pros Response • B. Def Reply	OR - XXX
D 010: Defense Motion to Dismiss Charge III	7 Dec 07	14 Dec 07	19 Dec 07	• Motion Filed • A. Prose Response • B. Def Reply	OR - XXX

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 011: Defense Motion to Dismiss Charge IV	7 Dec 07	14 Dec 07	4 Jan 07	• Motion Filed • A. Prosecution Response • B. Defense email dtd 18 Dec 07 requesting additional time to reply • C. MJ email dtd 19 Dec 08 granting Resp delay until 4 Jan 08 • D. Pros email dtd 19 Dec 08 objecting to delay • E. Defense Reply	OR – XXX A – XXX B – XXX C – XXX D – XXX E – XXX
D 012: Defense Motion to Dismiss Charge V	7 Dec 07	14 Dec 07	4 Jan 07	• Motion Filed • A. Prosecution Response • B. Defense email dtd 18 Dec 07 requesting additional time to reply • C. MJ email dtd 19 Dec 08 granting Resp delay until 4 Jan 08 • D. Pros email dtd 19 Dec 08 objecting to delay • E. Defense Reply	OR – XXX A – XXX B – XXX C – XXX D – XXX E – XXX
D 013: Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder)	7 Dec 07	14 Dec 07	4 Jan 07	• Motion Filed • A. Prosecution Response • B. Defense email dtd 18 Dec 07 requesting additional time to reply • C. MJ email dtd 19 Dec 08 granting Resp delay until 4 Jan 08 • D. Pros email dtd 19 Dec 08 objecting to delay E. Defense Reply	OR – XXX A – XXX B – XXX C – XXX D – XXX E – XXX

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 014: Defense Motion to Dismiss Charges for Lack of Jurisdiction (Equal Protection)	11 Jan 08	18 Jan 08	24 Jan 08	• Motion Filed • A. Prosecution Response • B. Defense Reply	OR – XXX A – XXX B – XXX
D 015: Defense Motion to Preclude Further Ex Parte Proceedings Under Color of MCRE 505(e)(3)	11 Jan 08	18 Jan 08	24 Jan 08	• Motion Filed • A. Prosecution Response • B. Defense Reply	OR – XXX A – XXX B – XXX
D 016: Defense Motion to Dismiss Spec 2 of Chg IV on grounds of Multiplicity & UMC	11 Jan 08	18 Jan 08	N/A	• Motion Filed • A. Prosecution Response • B. Email dtd 24 Jan 08, LCDR Kuebler stating no reply will be filed	OR – XXX A – XXX B – XXX
D 017: Motion for Appropriate Relief (Bill of Particulars)	11 Jan 08	18 Jan 08	N/A	• Motion Filed • A. Prosecution Response • B. Email dtd 24 Jan 08, LCDR Kuebler stating no reply will be filed	OR – XXX A – XXX B - XXX
D 018: Motion to Strike Terrorism in Chg III	11 Jan 08	22 Jan 08	28 Jan 08	• Motion Filed • A. Prosecution Response, 1636 hrs, 18 Jan 08 • B. Prosecution request to withdraw response, 2018 hrs, 18 Jan 08 • C. Original Response vacated by MJ, 2115 hrs, 18 Jan 08 • D. Prosecution Response, dtd 22 Jan 08 • E. Defense email dtd 25 Jan 08 requesting additional 24 hours to reply due to redaction issue • F. MJ email dtd 25 Jan 08 granting delay to reply NLT 1630 hours, 28 Jan 08 • G. Defense reply	OR – XXX A – XXX B – XXX C – XXX D – XXX E – XXX F – XXX G - XXX

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 019: Motion to Strike Surplus Language (Charge III)	11 Jan 08	18 Jan 08	N/A	• Motion Filed • A. Prosecution Response • B. Email dtd 24 Jan 08, LCDR Kuebler stating no reply will be filed	OR – XXX A – XXX B - XXX
D 020: Special Request for Relief from Terms of Protective Order No. 001	16 Jan 08	23 Jan 08	27 Jan 08	• Motion Filed • A. Prosecution Response • B. Defense Reply	OR – XXX A – XXX B - XXX
D 021: Defense Motion to Dismiss for Lack of Jurisdiction (Common Article 3)	17 Jan 08	24 Jan 08	29 Jan 08	• Motion Filed • A. Prosecution Response • B. Defense Reply	OR – XXX A – XXX B - XXX
D 022: Defense Motion to Dismiss Charges for Lack of Jurisdiction (Child Soldier)	18 Jan 08	25 Jan 08	31 Jan 08	• Motion Filed • A. Amicus Brief dtd 18 Jan 08 filed with Clerk of Court on behalf of Sen Robert Badinter ISO Motion to Dismiss • B. Amicus Brief dtd 18 Jan 08 filed with Clerk of Court on behalf of Canadian parliamentarians and law professors • C. Amicus Brief dtd 18 Jan 08 filed by Clerk of Court on behalf of Juvenile Law Center ISO Motion to Dismiss • D. Prosecution Response	OR – XXX A – None B – None C – None D - XXX
D 023: Defense Motion for Appropriate Relief (Strike Murder from Chg III)	18 Jan 08	25 Jan 08	30 Jan 08	• Motion Filed • A. Prosecution Response	OR – XXX A - XXX

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	• See Inactive Section	
MJ 002: Voir Dire	• See Inactive Section	
MJ 003: Rules of Court	• See Inactive Section	
MJ 004: Initial Notice of Trial Proceedings following CMCR Ruling	• See Inactive Section	
MJ 005: Special Instructions to Parties re 8 Nov 07 Hearing to determine Initial Threshold Status	• See Inactive Section	
MJ 006: Motion by Press Petitioners for Public Access to Proceedings and Records	• See Inactive Section	
MJ 007: Special Instructions to Parties re Submitting Documents Requiring Redaction	• See Inactive Section	
MJ 008: Emergency Weekend GTMO Visitation	• See Inactive Section	
MJ 009: Trial Schedule	• Sent to all parties 28 Nov 07 • A. Defense email dtd 18 Jan 08 reserving right to file additional law motions	OR – XXX A - XXX

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	# of Pages in Order	Date Signed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
1	Protective Order # 1	3	9 Oct 07	• Prosecution Motion to Request Issuance of Protective Order for Classified, FOUO or LES, and other markings • A. Prosecution email on 28 Sep 07 requesting Issuance of 29 May 07 Proposed Protective Orders • B. MJ email on 28 Sep 07 urging parties to confer and re-submit Requests for Protective Orders • C. Prosecution email 9 Oct 07 confirming agreement on FOUO and Classified Information Protective Order • D. MJ email containing FOUO and Classified Information Protective Order dtd 9 Oct 07	OR - 035 A – 031 B – 031 C – 031 D - 031
2	Protective Order # 2	2	12 Oct 07	• Prosecution Motion to Request Issuance of Protective Order for ID of Intelligence Personnel • A. Prosecution email on 28 Sep 07 requesting Issuance of 29 May 07 Proposed Protective Orders • B. MJ email on 28 Sep 07 urging parties to confer and re-submit Requests for Protective Orders • C. Prosecution email 9 Oct 07 confirming agreement on FOUO and Classified Information Protective Order • D. MJ Email 9 Oct 07 requesting Defense objections to Witness and Intelligence Personnel Proposed Protective Orders • E. Defense email response 9 Oct 07 outlining objections to Witness and Intelligence Personnel Proposed Protective Orders • F. MJ email 9 Oct 07 directing Prosecution to summarize necessity of proposed Witness and Intelligence Personnel Protective Orders • G. Prosecution email 9 Oct 07 summary of necessity of Witness and Intelligence Personnel Protective Orders •	OR – 035 A – 032 B - 032 C – 032 D – 032 E – 032 F – 032 G - 032

Pro Ord #	Designation when signed	# of Pages in Order	Date Signed	• Status /Disposition/Notes • 0R = First (original) filing in series • Letter indicates filings submitted after initial filing in the series. • R=Reference	AE
2 (Cont)	Protective Order # 2	2	12 Oct 07	• H. Defense objections to Prosecution's arguments of necessity for Witness and Intelligence Personnel Protective Orders • I. MJ email 12 Oct 07 containing Protective Order # 2 Intelligence Personnel	H – 032 I - 032
3	Protective Order # 3	2	15 Oct 07	• Prosecution Motion to Request Issuance of Protective Order for ID of Witnesses • A. Prosecution email on 28 Sep 07 requesting Issuance of 29 May 07 Proposed Protective Orders • B. MJ email on 28 Sep 07 urging parties to confer and re-submit Requests for Protective Orders • C. Prosecution email 9 Oct 07 confirming agreement on FOUO and Classified Information Protective Order • D. MJ Email 9 Oct 07 requesting Defense objections to Witness and Intelligence Personnel Proposed Protective Orders • E. Defense email response 9 Oct 07 outlining objections to Witness and Intelligence Personnel Proposed Protective Orders • F. MJ email 9 Oct 07 directing Prosecution to summarize necessity of proposed Witness and Intelligence Personnel Protective Orders • G. Prosecution email 9 Oct 07 summary of necessity of Witness and Intelligence Personnel Protective Orders • H. Defense objections to Prosecution's arguments of necessity for Witness and Intelligence Personnel Protective Orders • I. MJ email 12 Oct 07 with Proposed Protective Order # 3 Witnesses directing parties to comment by 1600 12 Oct 07 • J. Defense email 1421 12 Oct 07 commenting on Proposed Protective Order # 3 Witnesses • K. Prosecution email 1426 12 Oct 07 commenting on Proposed Protective Order # 3 Witnesses	OR – 035 A – 033 B – 033 C – 033 D – 033 E – 033 F - 033 G - 033 H - 033 I - 033 J – 033 K - 033

Pro Ord #	Designation when signed	# of Pages in Order	Date Signed	• Status /Disposition/Notes • 0R = First (original) filing in series • Letter indicates filings submitted after initial filing in the series. • R=Reference	AE
3 (Cont)	Protective Order # 3	2	15 Oct 07	• L. Defense email 1457 12 Oct 07 reply to Prosecution comments on Proposed Protective Order # 3 Witnesses • M. MJ email containing Protective Order # 3 Witnesses	L – 033 M - 033
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Inactive Section

Prosecution (P Designations)

Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
P 001: Motion to Reconsider (Dismissal Order)	1700hr 08 June 07	20 June 07		• Prosecution Motion to Reconsider (Dismissal Order) • A. MJ email on 08 June 07 denying prosecution requested relief (to extend appeal deadline) • B. Defense email declining to respond to Motion to Reconsider • C. MJ ruling on 29 June 07 denying Motion to Reconsider	OR - 017 A - 018 B - 022 C – 023
P 002: MCRE 505 Review Request				MJ email dtd 30 Nov 07 concerning methods of handling the disclosure of classified and other government information – in response to Prosecution ex parte request • A. Pros email dtd 1 Dec 07 notifying MJ of intent to file matters in camera and ex parte under R.M.C. 505e • B. MJ email dtd 2 Dec 07 confirming receipt of pros notification • C. Def email dtd 3 Dec 07 objecting to ex parte communications • D. MJ email dtd 3 Dec 07 offering R.M.C. 802 or delay on ruling until pros reply • E. Pros email dtd 4 Dec 07 replying to Def objections • F. Def email dtd 4 Dec 07 reaffirming objections to ex parte communication on R.M.C. 505e matter	OR -054 A – 054 B – 054 C – 054 D – 054 E – 054 F – 054

Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
P 002: MCRE 505 Review Request **(Continued)**				• G. Def email dtd 4 Dec 07, 8:00 pm, requesting oral argument • H. MJ ruling dtd 5 Dec on procedures for R.M.C. 505/506 matters • I. MJ email and ruling dtd 7 Dec 07 on Pros R.M.C. 505e en camera and ex parte matter raised 1 Dec 07	G – 054 H – 054 I - 054
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Inactive Section

Defense (D Designations)

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion to Vacate, or Alternately , for Continuance	25 Sep 07	27 Sep 07		• Defense Motion to Vacate, or Alternately, for a Continuance • A. Prosecution email 26 Sep 07 (opposing motion to vacate or continue) requesting deadline of COB 27 Sep 07 to file response • B. MJ email 26 Sep 07 directing Prosecution to file response by 1612 27 Sep 07 • C. Defense email 27 Sep 07 containing additional matters to consider re: Motion to Vacate, or Alternately, for a Continuance • D. MJ email 26 Sep 07 indicating MJ will consider Defense additional matters • E. Prosecution official response to Motion to Vacate, or Alternately, for Continuance 27 Sep 07 • F. MJ ruling on 27 Sep 07 granting a continuance to week of 5 Nov 07.	OR – 030 A – 030 B – 030 C – 030 D – 030 E – 030 F - 030
D 002: Motion for Abeyance of Proceedings	10 Oct 07	12 Oct 07	12 Oct 07	• Defense Motion to Abate 10 Oct 07 • A. MJ email 10 Oct 07 to Prosecution to advise commission on the government's position re Motion to Abate NLT 100 12 Oct 07 • B. Defense email 10 Oct 07containing additional matters re Motion to Abate	OR – 034 A - 034 B – 034

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 002: Motion for Abeyance of Proceedings **(Continued)**	10 Oct 07	12 Oct 07	12 Oct 07	• C. MJ email 10 Oct 07 instructing prosecution to consider additional matters • D. Government Response to Defense Motion to Abate 12 Oct 07 • E Defense reply to Government Response 12 Oct 07 • F. MJ ruling on 15 Oct 07 denying abeyance	C – 034 D – 034 E – 034 F - 034
D 003: Motion for Continuance				• Defense Motion for Continuance until on or about 6 Dec 07 • A. Summary of 24 Oct 07 R.M.C. 802 Hearing • B. Prosecution email dtd 25 Oct 07 requesting extension to 1600 hrs 25 Oct 07 to file response • C. MJ email 25 Oct 07 granting extension of Prosecution deadline for response until 1630 hrs 25 Oct 07 • D. MJ email 25 Oct 07 denying Motion for Continuance	OR - 041 A - 041 B - 041 C - 041 D - 041
D 004: Motion for Proper Status Determination	1 Nov 07	7 Nov 07		• Defense Motion for Proper Status Determination • A. Government Response to Defense Motion for Proper Status Determination, 7 Nov 07 • B. Government Email addressing Unresolved Issue 7 Nov 07 • C. MJ Ruling on Defense Motion for Proper Status Determination Hearing 7 Nov 07	OR – 042 A – 042 B – 042 C - 042
D 005: Motion for Continuance	2 Nov 07, 1111 hrs	2 Nov 07, 1701 hrs	2 Nov 07, 1854 hrs	• Defense Motion for Continuance • A. MJ Email directing government to respond NLT 1700 hrs 2 Nov 07	OR – 045 A – 045

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 005: Motion for Continuance **(Continued)**	2 Nov 07, 1111 hrs	2 Nov 07, 1701 hrs	2 Nov 07, 1854 hrs	• B. Government email response to Defense Motion to Continue 2 Nov 07, 1701 hrs • C. MJ Email 2 Nov 07, 1855 hrs denying Motion for Continuance • D. Defense email reply to Government response 2 Nov 07, 1854 hrs • E. MJ Email Affirming Denial of Motion to Continue 2 Nov 07, 2023 hrs	B – 045 C – 045 D – 045 E - 045
D 006: Defense Special Request for Deposition of FBI Witness	6 Nov 07	9 Nov 07	10 Nov 07	• Defense Special Request for Deposition of FBI Witness • A. MJ email dtd 6 Nov 07 urging Government Response to Defense Special Request for Deposition of FBI Witness • B. Government email response to Defense Special Request for Deposition of FBI Witness • C. MJ email dtd 10 Nov 07 asking if Defense Intended to Reply to Government Response to Defense Special Request for Deposition of FBI Witness • D. Defense email reply requesting leave to withdraw Special Request for Deposition of FBI Witness • E. NJ email dtd 10 Nov 07 granting withdrawal of Request for Deposition of FBI Witness	OR – 051 A - 051 B – 051 C – 051 D – 051 E - 051
D 007: Defense Request for Continuance for Submission of All Law Motions				• Defense Request for Continuance for Submission of All Law Motions • A. Defense proposed trial schedule dtd 29 Oct 07	OR – 052 A – 052

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 007: Defense Request for Continuance for Submission of All Law Motions **(Continued)**				• B. Government proposed trial schedule dtd 30 Oct 07 • C. R.M.C. 802 Hearing dtd 7 Nov 07 • D. MJ email dtd 9 Nov 07 granting Continuance for Submission of All Law Motions • E. MJ email dtd 11 Jan 08 clarifying Trial Clock and charging the Def with delay	B – 052 C – 049 D – 052 E - 052

Inactive Section

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	• Sent to all parties 25 Apr 07 w/arraignment date of 7 May • A. DC request continuance on 26 Apr to 6 Jun • B. TC opposition on 27 Apr • C. MJ ruling on 27 Apr - arraignment on 4 Jun • Email instructions to parties setting 802 session for 3 Jun 07 and arraignment for 0900, 4 Jun 07	OR - 005 A - 006 B - 006 C – 006 (none)
MJ 002: Voir Dire	• MJ sent bio and Matters re Voir Dire 25 Apr 07 directing questions be submitted 4 May 07 • A. MJ sent addendum to Voir Dire 15 Oct 07 addressing appointment of new Chief Prosecutor • B. Defense Email 1 Nov 07 with written voir dire questions • C. MJ Email 2 Nov 07 with responses to written voir dire	OR -005 A – 036 B – 036 C - 036
MJ 003: Rules of Court	• Sent to all parties 25 Apr 07 • A. Rules of Court (Change 1) sent to all parties 11 Oct 07 • B. Rules of Court (Change 2) sent to all parties 2 Nov 07	005 A – 037 B - 043
MJ 004: Initial Notice of Trial Proceedings following CMCR Ruling	• Sent to all Parties 25 Sep 07 • A. Defense Motion to Vacate, or Alternately, for Continuance **(SEE D 001)** • B. MJ ruling on 27 Sep 07 granting a continuance to week of 5 Nov 07. **(SEE D 001)** • C. Defense email 28 Sep 07 requesting relief for deadlines on submissions for 8 Nov 07 hearing • D. MJ email adjusting deadlines for submissions to reflect 8 Nov 07 hearing date	OR - 030 A - 030 B - 030 C - 030 D - 030

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 005: Special Instructions to Parties re 8 Nov 07 Hearing to determine Initial Threshold Status	• Sent to all parties 10 Oct 07 A. Prosecution email concerning discovery releases to Defense B. Prosecution Email 2 Nov 07 suggesting procedural and evidentiary guidelines for 8 Nov 07 Hearing	OR 036 A – 036 None
MJ 006: Motion by Press Petitioners for Public Access to Proceedings and Records	• Motion by Press Petitioners for Public Access to Proceedings and Records dtd 21 Nov 07 • A. MJ email dtd 21 Jun 07 directing parties to provide their positions on how the Commission should treat and respond to the Motion by Press Petitioners • B. Government Response to Motion by Press Petitioners for Public Access to Proceedings and Records dtd 28 Nov 07 • C. Defense Response to Motion by Press Petitioners for Public Access to Proceedings and Records dtd 28 Nov 07 • D. MJ Ruling on Motion by Press Petitioners for Public Access to Proceedings and Records dtd 28 Nov 07	OR – 053 A – 053 B – 053 C – 053 D - 053
MJ 007: Special Instructions to Parties re Submitting Documents Requiring Redaction	• MJ email dtd 30 Nov 07 instructing parties to ensure proper redaction takes place before submission of documents	(None)
MJ 008: Emergency Weekend GTMO Visitation	• MJ email dtd 28 Nov 07 instructing Trial Counsel to provide information on the weekend visitation policy at the GTMO detention facility • A. Pros email dtd 12 Dec 07 providing MJ information requested • B. MJ email dtd 12 Dec 07 denying Def request to delay start of 4 Feb 08 motions hearing to 6 Feb 07 (See MJ 009 – Trial Schedule)	OR – 055 A – 055 B - 055

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss All Charges for Lack of Jurisdiction 11 January 2008

1. **Timeliness**: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 28 November 2007 scheduling order.

2. **Relief Sought**: The Defense requests dismissal of all charges against Mr. Khadr brought pursuant to the Military Commissions Act of 2006 ("MCA").

3. **Overview**: By establishing a separate and unequal system of military commission trial exclusively for *non*-citizens charged with alleged war crimes, the MCA violates a fundamental principle of both U.S. and international law: the right to equal protection. Because the MCA overtly discriminates based on alienage, a classification the Supreme Court has recognized is "inherently suspect," it is subject to "close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). And the MCA cannot survive such scrutiny, because subjecting non-citizens and *only* non-citizens to trial by military commission is not narrowly tailored to serve any compelling government interest. The MCA is therefore unconstitutional, and cannot be enforced.

4. **Burdens of Proof and Persuasion**: Because this motion is jurisdictional in nature, the prosecution carries the burden of persuasion. *See* R.M.C. 905(c)(2)(B).

5. **Facts**: This motion presents a question of law.

6. **Law and Argument**:

A. AS AN ALIEN WITHIN THE TERRITORY OF THE UNITED STATES, MR. KHADR IS ENTITLED TO EQUAL PROTECTION UNDER U.S. LAW

(1) The Fourteenth Amendment of the U.S. Constitution expressly provides that "[n]o state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV (emphasis added). As the Supreme Court has made clear, this guarantee of equal protection applies to actions of both the federal and state governments. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("Equal protection analysis in the Fifth Amendment area [which governs actions of the federal government] is the same as that under the Fourteenth Amendment.") (quotation marks omitted).

(2) For more than a century, the Supreme Court has repeatedly held that the Constitution's guarantee of equal protection applies to non-citizens within the territory of the United States. *See, e.g., Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth Amendment], and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."). As the Court has explained, "the term 'person' in [the Fourteenth Amendment] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." *Graham*, 403 U.S. at 371.

(3) There is no doubt that this protection extends even to aliens unlawfully or involuntarily within the territory of the United States. As the Supreme Court held in *Matthews v. Diaz*:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

426 U.S. 67, 77 (1976) (internal citations omitted). Citing *Diaz*, the Supreme Court has subsequently observed that "we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Fifth and Fourteenth Amendments thus protect *all* aliens within the jurisdiction of the United States.[1]

(4) Mr. Khadr and the other aliens detained at Guantanamo are "within the jurisdiction of the United States." *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base.") (citing the terms of the 1903 lease agreement); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the

[1] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), is not to the contrary. That case stands only for the limited proposition that the "people" protected by the Fourth Amendment's prohibition against warrantless searches and seizures do not include aliens *on foreign soil*. *Id.* at 261. This case, of course, involves aliens *within* the territory of the United States. Further, the Fifth Amendment—unlike the Fourth—does not refer to the "people," but rather states that "no *person*" can be deprived of due process of law. And as the Supreme Court noted in *Plyler v. Doe*, "an alien is surely a 'person' in any ordinary sense of that term," and is therefore entitled to the protections of the Fifth Amendment. 457 U.S. at 210; *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1442-47 (1992) (recounting evidence that the Equal Protection Clause was intentionally phrased to extend certain rights to aliens).

United States to it.") (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)). Accordingly, as non-citizens within the jurisdiction of the United States, they are entitled to equal protection of the law.

(5) The D.C. Circuit's recent decision in *Boumediene v. Bush*, 476 F.3d 981 (2007), is not to the contrary. Initially, that case held only that Guantanamo detainees are not entitled to the protections of the Constitution's Suspension Clause. Its holding did *not* concern the applicability of the Fifth and Fourteenth Amendments to Guantanamo detainees.

(6) Further, to the extent that *Boumediene* may have suggested that constitutional provisions besides the Suspension Clause do not apply at Guantanamo, it did so only by brushing aside the Supreme Court's decision in *Rasul*, which (as noted) held that aliens detained at Guantanamo are within the territorial jurisdiction of U.S. courts. In *Boumediene*, the D.C. Circuit reasoned that because *Rasul* involved a question of "statutory interpretation," it was irrelevant to the D.C. Circuit's constitutional analysis under the Suspension Clause. 476 F.3d at 991 n.10. Invoking *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), which held that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction," the D.C. Circuit conducted its own analysis and concluded that—directly contrary to the Supreme Court's conclusion three years earlier—Guantanamo lies *outside* the territorial jurisdiction of United States courts. *Id*. This analysis adopts an artificially cramped reading of *Rasul*, and creates unnecessary tension between *Eisentrager* and *Rasul*. It is far more natural to read *Eisentrager* as setting out the standard for the extraterritorial application of constitutional rights, and *Rasul* as recognizing that Guantanamo satisfies that standard.

(7) In any event, the continuing viability of *Boumediene* has been called into serious question—first by the Supreme Court's extraordinary grant of certiorari on a petition for rehearing,[2] and second by the D.C. Circuit's own decision to recall the mandate it had previously issued in *Boumediene*. Under the Federal Rules of Appellate Procedure, an appellate decision "is not final until issuance of the mandate." Advisory Committee Notes, subdivision (c), Fed. R. App. P. 41. Numerous judges have recognized that "the Court of Appeals' withdrawal of the mandate in *Boumediene*," when considered along with "the Supreme Court's highly unusual grant of certiorari on rehearing," casts "a deep shadow of uncertainty over the jurisdictional ruling of that decision." *Alhami v. Bush*, No. 05-359, at 6 (GK) (D.D.C. Oct. 2, 2007); *see also Al-Oshan v. Bush*, No. 05-0520, at 6 n.2 (RMU) (D.D.C. Oct. 5, 3007) (noting that "the extraordinary procedural dispositions in *Boumediene* 'cast a deep shadow of uncertainty'" over the D.C. Circuit's jurisdictional ruling).

(8) On 19 December 2007, Military Judge Allred relied upon *Boumediene* to deny detainee Salim Hamdan's equal protection claim. *U.S. v. Hamdan*, slip op. at 10 (Mil. Comm'n Dec. 19, 2007) (Judge Allred) (On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction). As discussed above, *Boumediene* did not in fact involve an equal protection claim. Accordingly, Judge Allred's reliance on that opinion was misplaced.

[2] Because the Supreme Court initially denied certiorari, the votes of five Justices were required to grant certiorari on rehearing. According to legal scholars, *Boumediene* represents the first grant of certiorari on rehearing in decades. William Glaberson, *In Shift, Justices Agree to Hear Detainees' Case*, N.Y. Times, June 30, 2007.

(9) Equally important, Judge Allred's decision demonstrates the important role *Boumediene* would likely play in any decision by this Commission to deny Mr. Khadr's equal protection claim. Given the deep uncertainty surrounding *Boumediene*, if this Commission should determine that its decision on this motion will depend upon the continuing validity of the D.C. Circuit's decision in *Boumediene*, it should stay these proceedings until the Supreme Court reaches a decision in that case. (As this Commission is aware, oral argument has already been heard in *Boumediene*, and the Court is now drafting its decision.) That is precisely the course followed by several D.C. district court judges, who have stayed proceedings and refused to rule on Government motions to dismiss detainee habeas petitions in light of the uncertainty surrounding *Boumediene*. *See Maqaleh v. Gates*, No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct. 5, 3007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct. 2, 2007).

B. THE MCA IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION

(1) The MCA Deprives Aliens, and Only Aliens, of Many Rights and Protections Enjoyed by Citizens

(a) Turning to the substance of equal protection law, it is clear that the MCA violates the Equal Protection Clause. Initially, it is indisputable that the MCA creates classifications based on alienage: it expressly makes aliens and *only* aliens subject to trial by military commission. 10 U.S.C. § 948d(a). Under the MCA, the decision whether to try a person accused of alleged war crimes by military commission is based not on the gravity of the alleged crimes or the threat the accused purportedly poses to national security, but rather *solely* on whether he or she is a U.S. citizen. If a U.S. citizen and a non-citizen were accused of the same crime, such as conspiring with Al Qaeda operatives in Afghanistan to kill Americans, only the non-citizen would be subject to trial by military commission under the MCA. Indeed, even if a U.S. citizen were accused of a much more serious crime than a non-citizen and were viewed as a much more serious threat to national security, the non-citizen would nonetheless be the one to face trial by military commission.

(b) In addition to classifying accused persons based upon alienage, the MCA prescribes patently unequal treatment of aliens and U.S. citizens. The MCA, in other words, does not even purport to be "separate but equal." Rather, it explicitly and intentionally denies aliens many of the basic protections to which they would be entitled if they were to be prosecuted (like citizens) in either federal court or in the established and professionalized military commission system provided for by the Uniform Code of Military Justice. For example, the MCA subjects aliens, and only aliens, to criminal conviction by unauthenticated, anonymous, and hearsay evidence. *See* MCA § 948a. An alien tried by military commission can be convicted and sentenced to death based on coerced testimony—evidence that would never be admitted against a citizen in any court. *See* MCA § 3, 10 U.S.C. § 948r; Mil. Comm. R. Evid. ("M.C.R.E.") 304(a)(3).[3] The Rules promulgated under the MCA permit the prosecution in an

[3] Indeed, the MCA purports to permit military judges to admit statements made before December 30, 2005 even if the methods used to obtain the statement amounted to "cruel, inhuman, or degrading treatment or punishment." *See* Discussion to M. Comm. R. Evid. 304(c).

MCA proceeding to hide the interrogation methods used on the accused or witnesses by claiming a national security privilege. *See* MCA § 3, 10 U.S.C. 949d(f); Rule for Military Commission 701(f), Manual for Military Commission, United States (2007). The MCA also purports to deprive aliens, and only aliens, of the right to challenge both their detentions and this Commission's jurisdiction through petitions for habeas corpus.

(c) The Manual for Military Commissions ("MMC"),[4] promulgated pursuant to the MCA, further exacerbates the denial of equal protection to aliens subject to military commission jurisdiction. For example, the Rules allow defense counsel's cross-examination of witnesses to be limited in the name of protecting national security information. *See* M.C.R.E. 505(e)(2). This is a significant limit on a defendant's access to legitimate court proceedings, and again, it applies *only* because the defendant is an alien—not because of the crime with which he has been charged or the seriousness of the threat he purportedly poses to national security.

(2) The MCA is Subject to Strict Judicial Scrutiny Because it Classifies Based on Alienage and Impedes Access to the Courts

(a) The Supreme Court has held that non-citizens are a "prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate." *Graham*, 403 U.S. at 372 (quoting *United States v. Carolene Prods. Co*., 304 U.S. 144, 152-53 n.4 (1938)); *see also Carolene Prods*., 304 U.S. at 152-53 n.4 (suggesting that a "more searching judicial inquiry" may be necessary when laws burden "discrete and insular minorities"). As the Supreme Court recognized in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), certain classifications, including those based on alienage, are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Id.* at 440. Such classifications are therefore subject to strict scrutiny, both "[f]or [those] reasons and because such discrimination is unlikely to be soon rectified by legislative means." *Id.* As Justice Blackmun further explained, "the fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage." *Toll v. Moreno,* 458 U.S. 1, 23 (1982) (Blackmun, J., concurring).[5]

[4] The MMC includes the Rules for Military Commissions (R.M.C.) and the Military Commission Rules of Evidence (M.C.R.E.).

[5] While the federal government has some power to classify people based on alienage classifications, those exceptions are limited to two areas of law: immigration and government benefits. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Diaz*, 426 U.S. at 81-84. Neither exception is relevant here. Indeed, courts have specifically noted that these exceptions do *not* extend to laws affecting the prosecution and punishment of crimes. *See Rodriguez-Silva v. INS*, 242 F.3d 243, 247-48 (5th Cir. 2001) (noting that although the federal government has wide discretion in setting limits on immigration and naturalization which extends to regulating aliens' exclusion and removal, it is well-settled under *Wong Wing* that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States"); *see also* Neal Katyal, *Equality in the War on Terror*, 59 Stan. L. Rev. 1365, 1367 (2007) ("While discrimination by the federal government against aliens might be justified when it is handing out government benefits, it is not appropriate when it determines whether someone can be put before a

(b) Legislation is also subject to particularly critical judicial review where, as here, it compromises the integrity of a criminal trial or otherwise targets a suspect class for inferior treatment before the law. *See Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.") (internal quotations omitted); *Tate v. United States*, 359 F.2d 245, 250 (D.C. Cir. 1966) (same); *see also Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of "punitive measures . . . all persons within the territory of the United States are entitled to the protection of the Constitution") (internal quotations omitted); *Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that "[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime").

(c) In addition, the MCA must be subject to strict scrutiny because it burdens a fundamental right, the right of access to courts. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights . . . are given the most exacting scrutiny") (citation omitted); *Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (laws that burden the right of access to the courts "call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications"); *see also Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) (once open, avenues of appellate review "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts").

(3) The MCA Cannot Satisfy Strict Scrutiny Because Subjecting *Only* Aliens to Trial by Military Commission is Not Narrowly Tailored to Support a Compelling State Interest

(a) Because aliens are unable to protect themselves through the political process, any legislation that classifies individuals on the basis of alienage—and particularly any legislation that deprives only aliens of access to the courts—is "inherently suspect and subject to close judicial scrutiny." *Graham*, 403 U.S. at 372. This means that the Government bears the burden of showing both that the classification is supported by a "compelling" governmental interest and that "the means chosen . . . to effectuate its purpose [are] narrowly tailored to the achievement of that goal." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (internal quotation marks omitted). The MCA fails this test.[6]

(b) Initially, the Government has offered no compelling (or even legitimate) state interest that would justify subjecting aliens, and only aliens, to trial by military commission. Military commissions, and thus the state's interests in creating them, are borne of "military

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tribunal whose jurisdiction includes dispensing the most awesome powers of government, such as life imprisonment and the death penalty.").

[6] Indeed, for the reasons discussed herein, the MCA would violate the Equal Protection Clause even if a *less* stringent standard of review applied, as it is not even rationally related to any legitimate government purpose.

necessity," *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006) (plurality op.), and that necessity has nothing to do with the citizenship of the accused. If the exigencies of the war on terror are sufficient to justify the use of military commissions, then *all* persons accused of violating the MCA should be tried by commission (assuming such commissions are otherwise lawful).

(c) It is no secret that citizens, as well as non-citizens, have been accused of violating the law of war and may pose a serious danger to our national security. The very fact that the MCA specifically reserves the use of military commissions for "alien" unlawful enemy combatants, 10 U.S.C. § 948d(a), only highlights the reality that some U.S. citizens would also qualify as unlawful enemy combatants. As the Supreme Court recognized in *Hamdi v. Rumsfeld*, "[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict." 542 U.S. 507, 519 (2004) (internal quotation omitted).[7] If the exigencies of the war on terror do not require these citizens to be tried by military commission, then they do not require non-citizens to be so tried.

(d) The fact that federal courts have already been used to successfully prosecute both aliens and citizens for serious terrorism-related crimes demonstrates that there is no compelling governmental interest in segregating those charged with committing war crimes for separate and unequal trials based on their citizenship. Article III courts have already considered many terrorism cases involving both U.S. citizens[8] and aliens[9] associated with Al Qaeda. Many of these cases—including those involving both citizen[10] and alien[11] defendants—involved alleged conduct committed abroad. The Supreme Court itself has twice entertained claims by U.S. citizens—including an American formerly held at Guantanamo—who have been held for

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[7] Similarly, in striking down an English detention policy on equality grounds, the British House of Lords noted that British citizens have also been "suspected of being international terrorists" and observed that because "lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists," it is "difficult to see how the extreme circumstances, which alone would justify such detention, can exist." *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68, at 75-76; *see also id.* at 127.

[8] *See, e.g., United States v. Nettles*, 476 F.3d 508 (7th Cir. 2007) (citizen seeking Al Qaeda aid in bombing plot).

[9] *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000) (citizen prosecuted for acts committed abroad)

[10] *See, e.g., United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (citizen member of Taliban prosecuted for acts committed abroad); *see also United States v. Ali*, No.Crim.A.1:05-53, 2006 WL 1102835 (E.D .Va. 2006) (citizen member of Al Qaeda prosecuted for acts committed both in United States and abroad).

[11] *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (aliens prosecuted for conduct occurring both inside and outside of United States) ; *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (same); *United States v. Bin Laden, et al.*, 93 F. Supp. 2d 484, 486 (S.D.N.Y. 2000) (alien members of Al Qaeda prosecuted for acts committed abroad) ("[S]o long as a count alleges acts committed outside the United States in furtherance of a conspiracy to kill United States nationals, it alleges a violation of [18 U.S.C.] § 2332(b).").

conduct that would subject a similarly situated alien to trial by military commission under the MCA. *See Hamdi*, 542 U.S. 507.

(e) There is no reason to think that a citizen who violates the MCA is any less culpable or dangerous than a non-citizen who commits the same act. Indeed, the citizen terrorist—who might well be committing treason along the way—may be far *more* dangerous than his alien counterpart. As Attorney General Gonzales recently emphasized, "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so."[12] *Cf. A v. Sec. of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68, at 76-78 (Lord Nicholls) (striking down a British terrorist detention policy on equality grounds, and noting that "[t]he principal weakness in the Government's case lies in the different treatment accorded to nationals and non-nationals. . . . The Government has vouchsafed no persuasive explanation of why national security calls for a power of indefinite detention in one case but not the other."). If the dangers of terrorism require terrorists to be tried by military commission, then it follows that all terrorists should be tried in these commissions, not just aliens.

(f) The United States has never before felt the need to establish special tribunals to try aliens apart from non-citizens. In *Ex Parte Quirin*, 317 U.S. 1 (1942), the German saboteurs were tried in the same military commission as Herbert Hans Haupt, their American co-conspirator. *Id.* at 18, 20. And "[e]ven the horrendous internment of Japanese Americans in World War II applied symmetrically to citizens and aliens." Neal Katyal, *Equality in the War on Terror*, 59 Stan. L. Rev. 1365, 1389 (2007).

(g) The legislative history of the MCA confirms that the military commission system was created to target aliens and only aliens for trial by military commission regardless of their dangerousness or culpability compared to citizen terrorists.[13] In a stark illustration of the arbitrariness of the distinction, Rep. Stephen Buyer openly declared that selection of persons to be tried by commission was determined not by the gravity of the underlying conduct, not by the nature of the threat posed, and not by the adequacy of existing procedures for prosecuting terrorist suspects, but rather by alienage alone:

> Let's say an American citizen has been arrested for aiding and abetting a terrorist, maybe even participating in a conspiracy, or maybe participating in an action that

[12] Alberto Gonzalez, U.S. Att'y Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (Aug. 16, 2006) (transcript available at http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_060816.html).

[13] *See, e.g.*, 152 Cong. Rec. S10,250 (daily ed. Sept. 27, 2006) (statement of Sen. Warner) ("It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens—aliens, not U.S. citizens—bomb-makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are—again, only aliens . . . ."); *id.* at S10,267 (statement of Sen. Kyl) ("This legislation has nothing to do with citizens."); *id.* at S10,274 (statement of Sen. Bond) ("These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of war."); *id.* at H7544 (statement of Rep. Buyer) ("It will not apply to United States citizens."); *id.* at S10,251 (statement of Sen. Graham) ("Under no circumstance can an American citizen be tried in a military commission."); *see also* Katyal, *supra*, at 1373 n.19 (collecting these and other citations).

> harmed or killed American citizens. That American citizen cannot be tried in the military commission. His coconspirators could be tried in a military commission if they were an alien, but if that other coconspirator is an American citizen, they will be prosecuted under title 18 of the first chapter of a Federal crime, or even we could assimilate the State laws under the Assimilated Crimes Act.

152 Cong. Rec. H7940 (daily ed. Sept. 27, 2006) (statement of Rep. Buyer). The rationale given for treating aliens in a categorically different manner than Americans was merely the feeling of certain legislators that such treatment was what alien suspects "deserve[d]." *See* 152 Cong. Rec. S10395 (daily ed. Sept. 28, 2006) (Sen. John Cornyn) ("I happen to believe these individuals, who are high-value detainees at Guantanamo Bay, do not deserve the same panoply of rights preserved for American citizens in our legal system.").[14]

(h) Satisfying some vague sense that aliens do not "deserve" the protections provided by our domestic criminal justice system is not a compelling (or even legitimate) state interest. To the contrary: crafting legislation specifically to disadvantage a discrete and insular minority whose members have no influence in the political process is not only an illegitimate interest, but is the very harm the Equal Protection Clause is intended to prevent. As Justice Scalia has noted, "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *see also*, *e.g.*, *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). In such situations, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Id.* at 300. The MCA effectively—indeed, *purposefully*—violates that basic principle.

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[14] The arbitrariness and anti-alien sentiment behind the MCA's limitation to aliens is further demonstrated by the fact that the Executive initially considered proposing legislation that would have made all enemy combatants, aliens and citizens alike, triable by military commission. *See* Enemy Combatants Military Commission Act of 2006 (attached hereto as Attachment A); *see also* David S. Cloud & Sheryl Gay Stolberg, *Rules Debated for Trials of Detainees*, N.Y. Times, July 27, 2006, at A20; David S. Cloud & Sheryl Gay Stolberg, *White House Bill Proposes System to Try Detainees*, N.Y. Times, July 26, 2006, at A1 (describing copy of draft Administration Bill as being labeled The "for discussion purposes only, deliberative draft, close hold')'. During a Senate Armed Services Committee hearing on the draft legislation, however, Senators indicated to the Attorney General that they did not want aliens to receive the same rights as citizens. *See The Future of Military Commissions, Hearing of the Senate Armed Services Committee* (Aug. 2, 2006) (statement of Sen. Jeff Sessions) ("And let's be sure that these extraordinary protections that we provide to American soldiers and American civilians, because we live in such a safe nation that we can take these chances and give these extra rights, that we don't give them to people who have no respect for our law and are committed to killing innocent men and women and children."); *id*. (statement of Sen. James Inhofe) ("I want to make sure that we have everything in place here in Congress to make sure that the attorney-client privileges are not given to the detainees, at least not to the extent that they be to American citizens.").

(i) If Congress determines that alleged violations of the MCA create unique dangers that demand trial by military commission instead of in federal courts, then the Equal Protection Clause requires that it make all defendants—whether alien or not—eligible for trial by military commission. The Equal Protection Clause thus does not require that military commissions be eliminated, only that they be evenly applied. Katyal, *supra*, at 1368 ("The logic of equal protection challenges, by contrast, does not require the political branches to attain any particular substantive standard of protection; it merely requires that the chosen standard be doled out evenhandedly to all persons."). As Justice Scalia has explained:

> Invocation of the equal protection clause [compared to the due process clause] does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Cruzan, 497 U.S. at 300 (1990) (Scalia, J., concurring). Under the Equal Protection Clause of the U.S. Constitution, trial by military commissions must be imposed equally or not at all.

C. THE MCA VIOLATES THE EQUAL PROTECTION GUARANTEED BY INTERNATIONAL LAW

(1) The fundamental commitment to equal protection under the law exists not only under the U.S. Constitution, but also at international law. The International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, sets out in article 14(1) that all persons "shall be equal before the courts and tribunals."[15]

(2) The laws of war guarantee this right during an armed conflict. For example, the provisions of the Geneva Conventions dealing with grave breaches provide: "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949." [16]

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[15] Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by U.S. on June 8, 1992) [hereinafter ICCPR]; *see also* Exec. Order No. 13107 (Implementation of Human Rights Treaties) ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR . . . .").

[16] Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, art. 49, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Members of Armed Forces at Sea, art. 50, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135; Geneva

(3) The International Committee of the Red Cross Commentary on the Geneva Conventions explains that those articles common to the Conventions require that

> court proceedings . . . be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try war criminals of enemy nationality.[17]

(4) The MCA, by setting up special tribunals to try only *aliens* who are alleged to have violated the law of war, violates this fundamental principle of international law.

D. CONCLUSION

The right to equal protection under law is a fundamental part of both U.S. and international law. The MCA violates this principle by classifying persons accused of alleged war crimes based on their citizenship, and subjecting aliens—and only aliens—to trial by military commissions. The Government has offered no legitimate, let alone compelling, explanation for why it is necessary to subject aliens to trial by these special tribunals, but not U.S. citizens charged with similar (or even more dangerous) crimes. The Equal Protection Clause does not require Congress to establish any minimum substantive or procedural rights for the trials of those charged with war crimes. It requires only that the rights and rules Congress establishes be applied equally to all similarly charged defendants, regardless of their citizenship. The MCA was explicitly designed to contravene this principle, and thus violates the Equal Protection Clause of the U.S. Constitution.

7. **Oral Argument**: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.").

8. **Witnesses and Evidence**: Attachment A.

9. **Certificate of Conference**: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

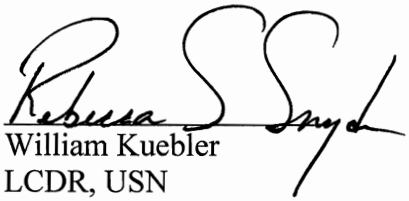
10. **Additional Information**: In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

Convention Relative to the Protection of Civilian Persons in Times of War, art. 146, *opened for signature* Aug. 12, 75 U.N.T.S. 287. All four conventions were ratified by the United States on Aug. 2, 1955.

[17] *See* International Committee of the Red Cross, Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Commentary (1960).

11. **Attachments:** The following attachments are electronically merged into this filing.

A. Administration Draft Bill

By: 

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

FOR DISCUSSION PURPOSES ONLY
DELIBERATIVE DRAFT—
CLOSE HOLD

A BILL

To facilitate bringing ~~terrorists~~ enemy combatants to justice through full and fair trial by military commissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CHAPTER 1—

SECTION 101. SHORT TITLE.

This Act may be cited as the "Enemy Combatant Military Commissions Act of 2006."

SECTION 102. FINDINGS.

The Congress finds:

(1) For more than 10 years, the al Qaeda terrorist organization has waged an unlawful war of violence and terror against the United States and its allies. Al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the U.S. Embassies in Kenya and Tanzania in 1998, and the attack on the U.S.S. *Cole* in Yemen in 2000. On September 11, 2001, al Qaeda launched the most deadly foreign attack on U.S. soil in history. Nineteen al Qaeda operatives hijacked four commercial aircraft and piloted them into the World Trade Center Towers in New York City and the headquarters of the U.S. Department of Defense at the Pentagon, and downed United Airlines Flight 93. The attack destroyed the Towers, severely damaged the Pentagon, and resulted in the deaths of approximately 3,000 innocent people.

(2) Following the attacks on the United States on September 11, Congress recognized the existing hostilities with al Qaeda and affiliated terrorist organizations and by the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40) recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

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(3) The President's authority to convene military tribunals arises from the Constitution's vesting in the President of the executive power and the power of Commander in Chief of the Armed Forces. As the Supreme Court of the United States recognized in *Madsen v. Kinsella*, 343 U.S. 341 (1952), "[s]ince our nation's earliest days, such tribunals have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. . . . They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth."

(4) Exercising authority vested in the President by the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and ~~consistent~~ in accordance with the laws of war, the President has (A) detained enemy combatants in the course of this armed conflict; and (B) issued the Military Order of November 13, 2001 to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," which authorized the Secretary of Defense to establish military commissions to try individuals subject to that Order by military commission for any offenses triable by military commission that such individuals are alleged to have committed.

(5) The Supreme Court in *Hamdan v. Rumsfeld* (2006) held that the military commissions established by the Department of Defense under the President's Military Order of November 13, 2001 were not consistent with certain aspects of U.S. domestic law. The Congress may by law, and does by enactment of this statute, eliminate any deficiency of statutory authority to facilitate bringing ~~alien~~ enemy combatants with whom the United States is engaged in armed conflict to justice for violations of the laws of war and other crimes triable by military commissions. The prosecution of such ~~alien~~ enemy combatants by military commissions established and conducted consistent with this Act fully complies with the Constitution, the laws of the United States, treaties to which the United States is a party, and the laws of war.

(6) The use of military commissions is particularly important because ~~the conflict between the United States and international terrorist organizations, including al Qaeda, the Taliban, and associated forces generally makes~~ other alternatives, such as the use of Federal courts or courts-martial, are impracticable. The terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment to the destruction of the United States and its people, to violation of the laws of war, and to the abuse of American legal processes. In a time of ongoing armed conflict, it is neither practicable nor appropriate for ~~alien~~

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enemy combatants like al Qaeda terrorists to be tried like American citizens in Federal courts or courts-martial.

(7) Many procedures for courts martial would not be practicable in trying alien enemy combatants for whom this Act provides for trial by military commission. For instance, court-martial proceedings would in certain circumstances—

(A) require the Government to share classified information with the accused, even though members of al Qaeda cannot be trusted with our Nation's secrets and it would not be consistent with the national security of the United States to provide them with access to classified information;

(B) exclude the use of hearsay evidence determined to be probative and reliable, even though the hearsay statements from, for example, fellow terrorists are often the only evidence available in this conflict, given that terrorists rarely fight and declare their intentions openly but instead pursue terrorist objectives in secret conspiracies the objectives of which can often be discerned only or primarily through hearsay statements from collaborators; and

(C) specify speedy trials and technical rules for sworn and authenticated statements when, due to the exigencies of wartime, the United States cannot safely require members of the armed forces to gather evidence on the battlefield as though they were police officers nor can the United States divert members from the front lines and their duty stations to attend military commission proceedings.

(8) The exclusive judicial review for which this Act, and the Detainee Treatment Act of 2005, provides, is without precedent in the history of armed conflicts involving the United States, exceeds the scope of judicial review historically provided for by military commissions, and is channeled in a manner appropriately tailored to—

(A) the circumstances of the conflicts between the United States and international terrorist organizations; and

(B) and the needs to ensure fair treatment of those detained as enemy combatants, to minimize the diversion of members of the armed force for from other wartime duties, and to protect the national security of the United States.

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(9) In early 2002, as memorialized in a memorandum dated February 7, 2002, the President determined that common Article 3 of the Geneva Conventions did not apply with respect to the United States conflict with al Qaeda because al Qaeda was not a party to those treaties and the conflict with al Qaeda was an armed conflict of an international character. That was the interpretation of the United States prior to the Supreme Court's decision in *Hamdan* on June 29, 2006. The statement by the Supreme Court in *Hamdan* that common Article 3 applied gave rise to uncertainties in the conduct of the conflict, and this Act addresses such uncertainties. In particular, this Act makes clear that the standards for treating detainees under the Detainee Treatment Act of 2005 fully satisfy any obligations of the United States regarding detainee treatment under common Article 3(1), except for those obligations arising under paragraphs (b) and (d). In addition, the Act makes clear that the Geneva Conventions are not a source of judicially enforceable individual rights, thereby reaffirming that enforcement of the legal and political obligations imposed by the Conventions is a matter between the nations that are parties to them.

SEC. ~~102~~103. DEFINITIONS.

As used in this Act:

~~(1) "alien enemy combatant" means an enemy combatant who is not a citizen of the United States;~~

~~(2)~~(1) "classified information" means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954;

~~(3)~~(2) "commission" means a military commission established pursuant to chapter 2 of this Act;

~~(4)~~(3) "enemy combatant," for the purposes of this statute, means a person engaged in hostilities against the United States or its coalition partners who has committed an act that violates the law of war and this statute. The term enemy combatant includes "lawful combatants" and "unlawful combatants." ~~a individual (other than an individual found by the President or the Secretary of Defense to be entitled to status as a prisoner of war or as a "protected person" under Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949) determined by or under the authority of the President or the Secretary of Defense, to—~~

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(A) "Lawful" enemy combatant include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power ~~be part of or supporting an international terrorist organization engaged in hostilities against the United States or its co-belligerents, including but not limited to al Qaeda, the Taliban, or associated forces;~~

(B) "Unlawful" enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. Spies and saboteurs are traditional examples of unlawful enemy combatants. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners ~~to have committed a belligerent act in aid of such an organization so engaged; or~~

~~(C) to have directly supported hostilities in aid of such enemy armed forces.~~

(4) "Geneva Conventions" means the four international conventions signed at Geneva, 12 August 1949, including common Article 3;

(5) "Law of war" is that part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law applicable to the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party (e.g., the Geneva Conventions of 1949), and applicable customary international law as recognized by the United States.

(6) "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

SEC. ~~103~~104. AUTHORIZATION FOR MILITARY COMMISSIONS.

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(a) The President is authorized to establish military commissions for the trial of alien enemy combatants for violations of the laws and customs of war and other crimes triable by military commissions as provided in chapter 2 of this Act. The grant of this authority should not be understood to limit the President's constitutional authority to establish military commissions on the battlefield, in occupied territories, or in armed conflicts should circumstances so require.

~~(b)~~ Military commissions shall have the authority, under such limitations as the President or Secretary of Defense may prescribe, to adjudge any punishment not forbidden by this act, including the penalty of death, imprisonment for life or term of years, payment of fine or restitution, or any other lawful punishment, ~~impose upon any accused found guilty after a proceeding under this Act a sentence that is appropriate to the offense or offenses for which there was a finding of guilt, which sentence may include death, imprisonment for life or term of years, payment of fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper.~~

(b)

(c) The Secretary of Defense or his designee shall be authorized to carry out a sentence of punishment decreed by a military commission pursuant to such procedures.

(d) The Secretary of Defense shall submit to the Armed Services Committees of the House of Representatives and the Senate an annual report on the conduct of trials by military commissions under this Act. Each such report shall be submitted in unclassified form, with classified annex, if necessary, and consistent with national security. The report shall be submitted not later than December 31 of each year.

(e) Pursuant to the President's authority under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and in accordance with the law of war, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. The authority to detain enemy combatants until the cessation of hostilities is wholly independent of any pre-trial detention or sentence to confinement that may occur as a result of a military commission. An enemy combatant may always be detained, regardless of the pendency or outcome of a military commission, until the cessation of hostilities as a means to prevent their return to the fight.

CHAPTER 2—MILITARY COMMISSIONS

This chapter may be cited as the "Code of Military Commissions" and shall be codified as Chapter 47A of Title 10, United States Code.

SEC. 201. MILITARY COMMISSIONS GENERALLY.

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~~(c)~~ PURPOSE.—This chapter codifies and establishes procedures governing the use of military commissions to try alien enemy combatants for violations of the laws of war and any other crimes triable by military commissions[3]. ~~Although military commissions have traditionally been constituted by order of the President, the decision of the Supreme Court in *Hamdan v. Rumsfeld* makes it both necessary and appropriate to codify procedures for military commissions as set forth herein.~~

(a)

(b) RULE OF CONSTRUCTION.—The procedures for military commissions set forth in this chapter are modeled after the procedures established for courts martial in the Uniform Code of Military Justice. As provided in Chapter 1, Section 102 (7), it is not practicable to try unlawful enemy combatants pursuant to the UCMJ or the procedures contained in the Manual for Courts-martial. However, due to the similarities of the UCMJ and CMC, the precedents established under the UCMJ may form precedential value for military judges and appellate courts when interpreting the rules under the CMC, but only insomuch as the provisions of each act are the same. It is not intended that any of the rights, privileges, or procedures contained under the UCMJ, and specifically removed from the CMC, are to be applied by implication or application. ~~It would be neither desirable nor practicable to try alien enemy combatants by court-martial procedures, however. Therefore, no construction or application of chapter 47 of this title shall be controlling in the construction or application of this chapter.~~[4]

(c) Members of al Qaeda and affiliated organizations may be tried for ~~war crimes~~violations of the law of war and offenses triable by military commissions committed against the United States or its co-belligerents before, on, or after September 11, 2001. A person charged with an offense under this Act may be tried and punished at any time without limitations. An acquittal or conviction under this act does not preclude the United States, in accordance with the law of war, to detain enemy combatants until the cessation of hostilities as a means to prevent their return to the fight.

(d) A military commission established under this chapter is a regularly constituted court, affording all the necessary judicial guarantees for purposes of common Article 3 of the Geneva Conventions.

SEC. 202. PERSONS SUBJECT TO MILITARY COMMISSIONS.

~~Alien e~~Enemy combatants, as defined in section 102 of this Act, shall be subject to trial by military commissions as set forth in this chapter.

(adapted from UCMJ Art. 2)

SEC. 203. JURISDICTION OF MILITARY COMMISSIONS.

Military commissions shall have jurisdiction to try any offense made punishable by this chapter, or by regulations promulgated pursuant to this chapter, when committed by an alien enemy combatant.

(adapted from UCMJ Art. 17, 18)

SEC. 204. WHO MAY CONVENE MILITARY COMMISSIONS.

(a) The Secretary of Defense may issue orders appointing one or more military commissions to try individuals under this chapter.

(b) The Secretary of Defense may delegate his authority to convene military commissions or to promulgate any regulations under this chapter.

(c) The "Secretary" in this chapter shall be the "Secretary of Defense." The "convening authority" shall be the Secretary of Defense or his designee.

(adapted from UCMJ Art. 22)

SEC. 205. WHO MAY SERVE ON MILITARY COMMISSIONS. [16]

(a) Any commissioned officer of the United States Armed Forces on active duty is eligible to serve on a military commission. Eligible commissioned officers shall include, without limitation, reserve personnel on active duty, National Guard personnel on active duty in Federal service, or retired personnel recalled to active duty.

(b) When convening a commission, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a commission when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(c) Before a commission is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case.

(adapted from UCMJ Art. 25)

SEC. 206. MILITARY JUDGE OF A MILITARY COMMISSION.

(a) A military judge shall be detailed to each commission. The Secretary shall prescribe regulations providing for the manner in which military judges are detailed for such commissions and for the persons who are authorized to detail military judges for such ~~courts-martial~~commissions. The military judge shall preside over each commission to which he has been detailed.

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(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a commission shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member in accordance with regulations prescribed under subsection (a). Unless the military commission is convened by the Secretary of Defense, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. ~~A commissioned officer who is certified to be qualified for duty as a military judge of a commission may perform such duties as are assigned to him by or with the approval of that Judge Advocate General or his designee.~~

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a commission may not consult with the members of the commission except in the presence of the accused (except as provided in section 216), trial counsel, and defense counsel, nor may he vote with the members of the commission.

(adapted from UCMJ Art. 26)

SEC. 207. DETAIL OF TRIAL COUNSEL AND DEFENSE COUNSEL

(a) Trial counsel and defense counsel shall be detailed for each commission. Assistant trial counsel and assistant and associate defense counsel may be detailed for each commission. Defense counsel shall be detailed as soon as practicable after the swearing of charges against the person accused. The Secretary of Defense shall prescribe regulations providing for the manner in which counsel are detailed for such commission and for the persons who are authorized to detail counsel for such commission.

(b) No person who has acted as investigating officer, military judge, or court commission member in any case may act later as trial counsel or, unless expressly requested by the accused, as defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

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(c) Trial counsel or defense counsel detailed for a military commission—

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member; or

(3) must be otherwise qualified to practice before the commission pursuant to regulations prescribed by the Secretary of Defense.

(adapted from UCMJ Art. 27)

SEC. 208. DETAIL OR EMPLOYMENT OF REPORTERS AND INTERPRETERS.

Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that commission. Under like regulations the convening authority may detail or employ interpreters who shall interpret for the commission, to include interpretation for the defense. [redacted]

(adapted from UCMJ Art. 28)

SEC. 209. ABSENT AND ADDITIONAL MEMBERS.

(a) No member of a military commission may be absent or excused after the ~~court~~ commission has been assembled for the trial of the accused unless excused as a result of challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(b) A military commission shall have at least five members. Whenever a military commission is reduced below that number, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the ~~court~~ commission has been read to the ~~court~~ commission in the presence of the military judge, the accused (except as provided by section 216), and counsel for both sides.

(adapted from UCMJ Art. 29)

SEC. 210. CHARGES AND SPECIFICATIONS.

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(a) Charges and specifications shall be signed by a person subject to the Uniform Code of Military Justice under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

(2) that they are true in fact to the best of his/her knowledge and belief.

(b) Upon the swearing of the charges in accordance with subsection (a), the person accused shall be informed of the charges against him as soon as practicable.

(adapted from UCMJ Art. 30)

SEC. 211. COMPULSORY SELF-INCRIMINATION PROHIBITED.

(a) No person shall be required to testify against himself at a commission proceeding.

(b) Statements obtained by use of torture, as defined in 18 U.S.C. § 2340, whether or not under color of law, shall not be admissible, except against a person accused of torture as evidence the statement was made. No otherwise admissible statement obtained through the use of [redacted] may be received in evidence if the military judge finds that the circumstances under which the statement was made render it unreliable or lacking in probative value.

(adapted from UCMJ Art. 31)

SEC. 212. SERVICE OF CHARGES.

The trial counsel to whom charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had in English and, if appropriate, in another language that the accused understands, sufficiently in advance of trial to prepare a defense.

(adapted from UCMJ Art. 35)

SEC. 213. RULES OF PROCEDURE.

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases triable in military commissions may be prescribed by the Secretary of Defense, but may not be contrary to or inconsistent with this chapter.

(b) Subject to such exceptions and limitations as the Secretary of Defense may provide by regulation, evidence in a military commission shall be admissible if the military judge determines that the evidence would have probative value to a

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~~reasonable person~~ is relevant and has probative value~~s~~. Hearsay evidence shall be admissible in the discretion of the military judge unless the circumstances render it unreliable or lacking in probative value.

(c) SUBMISSION OF PROCEDURES.—Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall submit to the Armed Services Committees of the House of Representatives and the Senate a report setting forth the procedures for military commissions promulgated under this chapter. Thereafter, the Secretary of Defense shall submit to the same committees a report on any modification of such procedures, no later than 60 days before the date on which such modifications shall go into effect.

(adapted from UCMJ Art. 36)

SEC. 214. UNLAWFULLY INFLUENCING ACTION OF COMMISSION.

(a) No authority convening a military commission may censure, reprimand, or admonish the commission or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person may attempt to coerce or, by any unauthorized means, influence the action of a commission or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to

(1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions, or

(2) to statements and instructions given in open proceedings by the military judge or counsel.

~~(b)~~In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person may, in preparing any such report consider or evaluate the performance of duty of any such member of a commission, or give a less favorable rating or evaluation of any member or the armed forces because of the zeal with which such member, as counsel, represented any accused before a military commission. ~~as counsel in representing any accused before a military commission.~~

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(b)

(adapted from UCMJ Art. 37)

SEC. 215. DUTIES OF TRIAL COUNSEL AND DEFENSE COUNSEL.

(a) TRIAL COUNSEL.—The trial counsel of a military commission shall prosecute in the name of the United States, and shall, under the direction of the ~~court~~commission, prepare the record of the proceedings.

(b) DEFENSE COUNSEL.—

(1) The accused shall be represented in his defense before a military commission as provided in this subsection[no].

(2) The accused may be represented by civilian counsel if ~~provided~~retained by him, provided that civilian counsel: (i~~1~~) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher; (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings; and (vi) complies with any other requirements that the Secretary of Defense may prescribe by regulation[n11].

(3) The accused shall also be represented by military counsel detailed under section 207 of this chapter.

(4) If the accused is represented by civilian counsel, military counsel detailed shall act as associate counsel.

(5) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 207 of this chapter to detail counsel in his sole discretion may detail additional military counsel.

(adapted from UCMJ Art. 38)

SEC. 216. SESSIONS.

(a) At any time after the service of charges which have been referred for trial by military commission, the military judge may call the commission into session without the presence of the members for the purpose of—

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(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the commission;

(3) if permitted by regulations of the Secretary of Defense, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 213 of this chapter and which does not require the presence of the members of the commission.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel, except as provided by subsection (c), and shall be made part of the record.

(b) When the members of the commission deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the commission with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, and the trial counsel, except as provided by subsection (c).

(c) The military commission shall hold open proceedings, in the presence of the accused, except as provided in this subsection.

(1) The military judge may close all or part of a proceeding on his own initiative or based upon a presentation, including an *ex parte* or *in camera* presentation, by either the prosecution or the defense.

(2) The military judge may close to the public all or a portion of the proceeding upon a finding that closing of the proceeding is necessary to protect classified information; information the disclosure of which could reasonably be expected to cause identifiable damage to the public interest; the physical safety of the participants in the proceeding; intelligence and law enforcement sources, methods, or activities; or other national security interests.

(3) A decision to close a proceeding or portion thereof may include a decision to exclude the accused only upon a finding by the military judge that doing so is necessary to protect the national security, to ensure the safety of individuals, or to prevent disruption. One military defense counsel shall be present for all trial proceedings, and the exclusion of the accused shall be no broader than necessary.

(4) If the accused is denied access to classified evidence presented in the proceeding, a redacted or unclassified summary of evidence shall be provided, if it is possible to do so without compromising intelligence sources, methods, or activities, or other national security interests. No evidence shall be admitted to which the accused has been denied access if its admission would result in the denial of a [redacted].

(adapted from UCMJ Art. 39)

SEC. 217. CONTINUANCES.

The military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

(adapted from UCMJ Art. 40)

SEC. 218. CHALLENGES.

(a) The military judge and members of the commission may be challenged by the accused or the trial counsel for cause stated to the commission. The military judge shall determine the relevance and validity of the challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those challenges presented by the defense ~~by the accused~~ are offered.

(b) Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause.

(adapted from UCMJ Art. 41)

SEC. 219. OATHS.

(a) Before performing their respective duties, military judges, members of commissions, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel, may be taken at any time by any judge advocate or other person certified to be qualified or competent for duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.

(b) Each witness before a commission shall be examined on oath.

(adapted from UCMJ Art. 42)

SEC. 220. FORMER JEOPARDY.

(a) No person may, without his consent, be tried by a commission a second time for the same offense.

(b) No proceeding in which the accused has been found guilty by military commission upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

(adapted from UCMJ Art. 44)

SEC. 221. PLEAS OF THE ACCUSED[113].

(a) If an accused after charges have been filed makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the commission shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty is sought. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge, a finding of guilty of the charge or specification may, if permitted by regulations, be entered immediately without a vote. This finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

(adapted from UCMJ Art. 45)

SEC. 222. OPPORTUNITY TO OBTAIN WITNESSES AND OTHER EVIDENCE.

(a) Defense counsel shall have opportunity to obtain witnesses and other evidence in accordance with such regulations as the Secretary of Defense may prescribe. Defense counsel may cross-examine each witness for the prosecution who testifies before the commission. Process issued in military commissions to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any place where the United States shall have jurisdiction thereof.

(b) As soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused. Exculpatory evidence that is classified may be provided solely to military defense counsel, after in camera review by the military judge. All exculpatory classified evidence shall be provided to the accused in a redacted or summary form, if it is possible to do so without compromising intelligence sources, methods, or activities, or other national security interests.

(adapted from UCMJ Art. 46)

SEC. 223. DEFENSE OF LACK OF MENTAL RESPONSIBILITY.

(a) It is an affirmative defense in a trial by military commission that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(adapted from UCMJ Art. 50A)

SEC. 224. VOTING AND RULINGS.

(a) Voting by members of a military commission on the findings and on the sentence shall be by secret written ballot.

(b) The military judge shall rule upon all questions of law, including the admissibility of evidence, and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the commission. However, the military judge may change his ruling at any time during the trial.

(c) Before a vote is taken of the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the commission as to the elements of the offense and charge them—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

(adapted from UCMJ Art. 51)

SEC. 225. NUMBER OF VOTES REQUIRED.

(a) CONVICTION[n4].—

~~No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the military commission present at the time the vote is taken.~~

~~(2)~~

(1) No person may be convicted of any ~~other~~ offense, except as provided in section 221(b) of this chapter or by concurrence of two-thirds of the members present at the time the vote is taken.

(2) Where less than two-thirds of the members present at the time the vote is taken do not concur, the accused is acquitted of the respective offense.

(b) SENTENCE.—

(1) Capital Cases. Where the President or Secretary have expressly made an offense punishable by death, ~~N~~no person may be sentenced to suffer death, unless all members present at the time the vote is taken ~~except~~

(A) unanimously concur in a finding of guilty; and

(B) unanimously concur in a sentence of death, ~~by the concurrence of all the members of the military commission present at the time the vote~~

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~~is taken and for an offense in this chapter expressly made punishable by death.~~

(2) Non-Capital Cases.

(A) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken(,15).

(B) All other sentences shall be determined by the concurrence of two-thirds of the members at the time the vote is taken.

(adapted from UCMJ Art. 52)

SEC. 226. COMMISSION TO ANNOUNCE ACTION.

A military commission shall announce its findings and sentence to the parties as soon as determined.

(adapted from UCMJ Art. 53)

SEC. 227. RECORD OF TRIAL.

(a) Each military commission shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Where appropriate, and as provided by regulation, the record of the military commission may contain a classified annex.

(b) A complete record of the proceedings and testimony shall be prepared in every military commission established under this chapter.

(c) A copy of the record of the proceedings of each military commission shall be given to the accused as soon as it is authenticated. Where the record contains classified information, or a classified annex, the accused should receive a redacted version of the record. The appropriate defense counsel shall have access to the unredacted record, as provided by regulation.

(adapted from UCMJ Art. 54)

SEC. 228. CRUEL OR UNUSUAL PUNISHMENTS PROHIBITED.

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Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

(adapted from UCMJ Art. 55)

SEC. 229. MAXIMUM LIMITS.

The punishment which a military commission may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense.

(adapted from UCMJ Art. 56)

SEC. 230. EXECUTION OF CONFINEMENT[J16].

Under such regulations as the Secretary of Defense may prescribe, a sentence of confinement adjudged by a military commission may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. Any sentence to confinement will have no effect upon the ability of the United States, in accordance with the law of war, to detain enemy combatants until the cessation of hostilities.

(adapted from UCMJ Art. 58)

SEC. 231. ERROR OF LAW; LESSER INCLUDED OFFENSE.

(a) A finding or sentence of a military commission may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

(adapted from UCMJ Art. 59)

SEC. 232. REVIEW BY THE CONVENING AUTHORITY.

(a) The findings and sentence of a military commission shall be reported promptly to the convening authority after the announcement of the sentence.

(b) REVIEW BY CONVENING AUTHORITY.—

(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. Such a submission shall be made within 10 days after the accused has been given an authenticated record of trial.

(2) If the accused shows that additional time is required for the accused to submit such matters, the convening authority, for good cause, may extend the applicable period under paragraph (1) for not more than an additional 20 days.

(3) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.

(c) ACTION BY THE CONVENING AUTHORITY.—

(1) The authority under this section to modify the findings and sentence of a military commission is a matter of ~~command~~ prerogative involving the sole discretion of the convening authority.

(2) Action on the sentence of a military commission shall be taken by the convening authority. Subject to regulations of the Secretary of Defense, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier. The convening authority, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase the sentence beyond that which is found by the commission.

(3) Action on the findings of a military commission by the convening authority is not required. However, such person, in his sole discretion, may—

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge.

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(d) ORDER OF REVISION OR REHEARING.—

(1) The convening authority, in his sole discretion, may order a proceeding in revision or a rehearing.

(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision—

(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation;

(C) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(3) A rehearing may be ordered by the convening authority if he disapproves the findings and sentence and states the reasons for disapproval of the findings. If such a person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority disapproves the sentence.

(adapted from UCMJ Art. 60)

SEC. 233. WAIVER OR WITHDRAWAL OF APPEAL.

(a) In each case subject to appellate review under section 236 or 237 of this chapter, except a case in which the sentence as approved under section 232 of this chapter includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by a defense counsel and must be filed within 10 days after the action under section 232 of this chapter is served on the accused or on defense counsel. The convening authority, for good cause, may extend the period for such filing by not more than 30 days.

(b) Except in a case in which the sentence as approved under section 233 of this chapter includes death, the accused may withdraw an appeal at any time.

(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 236 or 237 of this chapter.

(adapted from UCMJ Art. 61)

SEC. 234. APPEAL BY THE UNITED STATES.

(a) In a trial by military commission, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge which terminates commission proceedings with respect to a charge or specifications or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty by the commission with respect to the charge or specification.

(b) The United States shall take an appeal by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

(c) An appeal under this section shall be forwarded by means prescribed under regulations of the Secretary of Defense directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law.

(adapted from UCMJ Art. 62)

SEC. 235. REHEARINGS.

Each rehearing under this chapter shall take place before a military commission composed of members not members of the commission which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first commission, and no sentence in excess of or more than the original sentence may be imposed unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first commission was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first commission.

(adapted from UCMJ Art. 63)

SEC. 235. REVIEW BY COURT OF MILITARY COMMISSION REVIEW.

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(a) The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions, the court may sit in panels or as a whole in accordance with rules prescribed by the Secretary.

(b) The Secretary of Defense shall assign appellate military judges to a Court of Military Commission Review, who may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State.

(c) Both the accused and the United States, pursuant to section 235, may take an appeal from the final decision of a military commission to the Court of Military Commission Review in accordance with procedures prescribed under regulations of the Secretary of Defense.

(d) In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law.

(adapted from UCMJ Art. 66)

SEC. 236. REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Pursuant to Section 1005(e)(3) of the Detainee Treatment Act of 2005, the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission. The Court of Appeals shall not review the final judgment until all other appeals under this chapter have been waived or exhausted. The Supreme Court of the United States may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28, United States Code.

(adapted from UCMJ Art. 67)

SEC. 237. APPELLATE COUNSEL.

(a) The Secretary of Defense shall, by regulation, establish procedures for the appointment of appellate counsel for the United States and for the accused. Appellate counsel shall meet the qualifications for appearing before military commissions under this chapter.

(b) Appellate counsel may represent the United States in any appeal or review proceeding under this chapter. Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.

(c) The accused shall be represented by appellate military counsel before the Court of Military Commission Review, the United State Court of Appeals for the District of Columbia Circuit, or the Supreme Court, or by civilian counsel if provided by him, so long as the civilian counsel meets the qualifications for appearing before military commissions under this chapter.

(adapted from UCMJ Art. 70)

SEC. 239. EXECUTION OF SENTENCE; SUSPENSION OF SENTENCE.

(a) If the sentence of the commission extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.

(b) If a sentence extends to death, the sentence may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death, approval under subsection (a)). A judgment as to legality of the proceedings is final in such cases when review is completed by the Court of Military Commission Review and—

(1) the time for the accused to file a petition for review by the Court of Appeals for the D.C. Circuit has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court; or

(2) review is completed in accordance with the judgment of the Court of Appeals for the D.C. Circuit and (i) a petition for a writ of certiorari is not timely filed; (ii) such a petition is denied by the Supreme Court; or (iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(c) The Secretary of Defense or the convening authority acting on the case under section 233 of this chapter may suspend the execution of any sentence or part thereof, except a death sentence.

(adapted from UCMJ Art. 71)

SEC. 240. FINALITY OF PROCEEDINGS, FINDINGS, AND SENTENCES.

(a) The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions are binding upon all departments, courts, agencies, and officers of the United States, subject only to action by the Secretary

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of Defense as provided in section 240 of this chapter, and the authority of the President.

(b) Except as provided for in this chapter, and notwithstanding any other law, including section 2241 of title 28, United States Code (or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of enactment of this Act, relating to the prosecution, trial, or judgment of a military commission convened under this section, including challenges to the lawfulness of commission procedures.

(adapted from UCMJ Art. 76)

SEC. 241. SUBSTANTIVE OFFENSES.

(a) BACKGROUND.—The following provisions codify offenses that have traditionally been tried by military commissions. This Act does not purport to establish new crimes that did not exist before its establishment, but rather to codify those crimes for trial by military commission and for other purposes under federal law. Because these provisions are declarative of existing law, they do not preclude trial for crimes that occurred prior to their effective date.

(b) The Secretary of Defense may, by regulation, specify other violations of the laws of war that may be tried by military commission, provided that no such offense may be cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.

(adapted from UCMJ subchapter X)

SEC. 242. PRINCIPALS.

Any person punishable under this chapter who—

(a) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission or

(b) causes an act to be done which if directly performed by him would be punishable by this chapter, is a principal.

(adapted from UCMJ Art. 77)

SEC. 243. ACCESSORY AFTER THE FACT.

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in

order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission may direct.

(adapted from UCMJ Art. 78)

SEC. 244. CONVICTION OF LESSER OFFENSE.

An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

(adapted from UCMJ Art. 79)

SEC. 245. ATTEMPTS.

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this act shall be punished as a military commission may direct.

~~(b)~~(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(adapted from UCMJ Art. 80)

SEC. 246. SOLICITATION.

Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission may direct.

(adapted from UCMJ Art. 82)

SEC. 247. CRIMES TRIABLE BY MILITARY COMMISSION.

The following enumerated offenses, when committed in the context of and associated with armed conflict, shall be triable by military commission under this chapter.

(a) DEFINITIONS.—

(1) COMBATANT IMMUNITY.—"Combatant immunity" means the privilege accorded to lawful combatants ~~under the law of~~who are in compliance with the law of war ~~armed conflict~~.

(2) PROTECTED PERSON.—For purposes of this section, "protected person" refers to any person who is protected under one or more of the Geneva Conventions, including those placed *hors de combat* by sickness, wounds, or detention, and medical or religious personnel taking no direct or active part in hostilities.

(3) PROTECTED PROPERTY.— "Protected property" refers to property specifically protected by the law of ~~armed conflict~~war such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provide they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

(b) OFFENSES IN VIOLATION OF THE LAWS OF WAR.—

(1) WILLFULLY KILLING PROTECTED PERSONS.—Any person who intentionally kills one or more protected persons other than incident to a lawful attack is guilty of the offense of willfully killing protected persons and shall be subject to whatever punishment the commission may direct.

(2) ATTACKING CIVILIANS.—Any person who intentionally engages in an attack upon a civilian population as such or individual civilians not taking direct or active part in hostilities other than incident to a lawful attack is guilty of the offense of attacking civilians and shall be subject to whatever punishment the commission may direct.

(3) ATTACKING CIVILIAN OBJECTS.—Any person who intentionally engages in an attack upon civilian objects (property that is not a military objective) other than incident to a lawful attack shall be guilty of the offense of attacking civilian objects and shall be subject to whatever punishment the commission may direct.

(4) ATTACKING PROTECTED PROPERTY.—Any person who intentionally engages in an attack upon protected property other than incident to a lawful attack shall be guilty of the offense of attacking protected property and shall be subject to whatever punishment the commission may direct.

(5) PILLAGING.—Any person who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such

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appropriation or seizure, shall be guilty of the offense of pillaging and shall be subject to whatever punishment the commission may direct.

(6) DENYING QUARTER.—Any person who, with effective command or control over subordinate forces, declares, orders, or otherwise indicates to those forces that there shall be no survivors or surrender accepted, with the intent therefore to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be guilty of denying quarter and shall be subject to whatever punishment the commission may direct.

(7) TAKING HOSTAGES.—Any person who, having seized or detained one or more persons in violation of the laws of armed conflict, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be guilty of the offense of taking hostages and shall be subject to whatever punishment the commission may direct.

(8) EMPLOYING POISON OR ANALOGOUS WEAPONS.—Any person who intentionally, as a method of warfare, employs a substance or a weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be guilty of employing poison or analogous weapons and shall be subject to whatever punishment the commission may direct.

(9) USING PROTECTED PERSONS AS SHIELDS.—Any person who positions, or otherwise takes advantage of, protected persons with the intent to shield a military objective from attack or to shield, favor, or impede military operations, shall be guilty of the offense of using protected persons as a shields and shall be subject to whatever punishment the commission may direct.

(10) USING PROTECTED PROPERTY AS SHIELDS.—Any person who positions, or otherwise takes advantage of the location of, civilian property or protected property under the law of war with the intent to shield a military objective from attack or to shield, favor, or impede military operations, shall be guilty of the offense of using protected property as shields and shall be subject to whatever punishment the commission may direct.

(11) TORTURE.—Any person who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control shall be guilty of torture and subject to

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whatever punishment the commission may direct. "Severe mental pain or suffering" has the meaning provided in 18 U.S.C. § 2340(2).

(12) WILLFULLY CAUSING GREAT SUFFERING OR SERIOUS INJURY.—Any person who intentionally causes serious injury or serious endangerment to the body or health of one or more protected persons shall be guilty of the offense of causing serious injury and shall be subject to whatever punishment the commission may direct.

(13) MUTILATING OR MAIMING.—Any person who intentionally injures one or more protected persons, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose, shall be guilty of the offense of mutilation or maiming and shall be subject to whatever punishment the commission may direct.

(14) USING TREACHERY OR PERFIDY.—Any person who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons, shall be guilty of using treachery or perfidy and shall be subject to whatever punishment the commission may direct.

(15) IMPROPERLY USING A FLAG OF TRUCE.—Any person who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there is no such intention, shall be guilty of improperly using a flag of truce and shall be subject to whatever punishment the commission may direct.

(16) IMPROPERLY USING A DISTINCTIVE EMBLEM.—Any person who intentionally uses a distinctive emblem recognized by the law of armed conflict for combatant purposes in a manner prohibited by the law of armed conflict shall be guilty of improperly using a distinctive emblem and shall be subject to whatever punishment the commission may direct.

(17) WILLFULLY MISTREATING A DEAD BODY.—Any person who intentionally mistreats the body of a dead person, without justification by legitimate military necessary, shall be guilty of the offense of mistreating a dead body and shall be subject to whatever punishment the commission may direct.

(18) RAPE.—Any person who forcibly or with coercion or threat of force invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused or with any foreign object shall be guilty of the offense of rape and shall be subject to whatever punishment the commission may direct.

(19) CONSPIRACY.—Any person who conspires to commit one or more substantive offenses triable under this section, and who knowingly does any overt act to effect the object of the conspiracy, shall be guilty of conspiracy to commit a war crime and shall be subject to whatever punishment the commission may direct[n17].

(c) OTHER OFFENSES TRIABLE BY MILITARY COMMISSION.—

(1) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT.—Any person not protected by combatant immunity who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of, a vessel or aircraft that was not a legitimate military target is guilty of the offense of hijacking or hazarding a vessel or aircraft and shall be subject to whatever punishment the commission may direct.

(2) TERRORISM.—Any person not protected by combatant immunity who intentionally kills or inflicts great bodily harm on one or more persons in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be guilty of the offense of terrorism and shall be subject to whatever punishment the commission may direct.

(3) MURDER BY AN UNPRIVILEGED BELLIGERENT.—Any person not protected by combatant immunity who intentionally kills one or more persons, or intentionally engages in an act that evinced a wanton disregard for human life, shall be guilty of the offense of murder by an unprivileged belligerent and shall be subject to whatever punishment the commission may direct.

(4) DESTRUCTION OF PROPERTY BY AN UNPRIVILEGED BELLIGERENT.—Any person not protected by combatant immunity who intentionally destroys property belonging to another person, without that person's consent, shall be guilty of the offense of destruction of property by an unprivileged belligerent and shall be subject to whatever punishment the commission may direct.

(5) WRONGFULLY AIDING THE ENEMY.—Any person who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States or one its co-belligerents shall be guilty of the offense of wrongfully aiding the enemy and shall be subject to whatever punishment the commission may direct.

(6) SPYING.—Any person who collects or attempts to collect certain information, intending to convey such information to an enemy of the United States or one of its co-belligerents, by clandestine means or while

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acting under false pretenses, shall be guilty of the offense of spying and shall be subject to whatever punishment the commission may direct.

SEC. 248. PERJURY AND OBSTRUCTION OF JUSTICE.

The military commissions also may try offenses and impose punishments for perjury, false testimony, or obstruction of justice related to military commissions.

(adapted from UCMJ Art. 84)

UNITED STATES OF AMERICA	**D014**
	GOVERNMENT'S RESPONSE
v.	
	To the Defense's Motion to Dismiss for Lack of Jurisdiction (Equal Protection)
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**18 January 2008**

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion to dismiss all charges for lack of jurisdiction should be denied.

3. Overview:

a. Alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the equal protection component of the Due Process Clause. Furthermore, even when an alien is found within United States sovereign territory, the alien's lack of *voluntary* connection to the Nation denies him protection under the Constitution. In light of these principles, the accused cannot credibly claim any constitutional protections, including those of the equal protection component of the Due Process Clause. The accused is an alien who has no voluntary connection to the United States. Furthermore, he is detained at Guantanamo Bay, Cuba, and it is clear that Guantanamo is outside the sovereign territory of the United States. Both the D.C. Circuit in *Boumediene v. Bush* and the military judge in *United States v. Hamdan* have already rejected the novel claim that mere detention at Guantanamo Bay, Cuba, entitles one to protection under the Constitution, and this commission should deny the motion to dismiss.

b. Even if the accused somehow possesses constitutional rights, application of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"), only to *alien* unlawful enemy combatants is a rational distinction when the United States is at war with foreign enemies. Distinctions between citizens and aliens drawn by Congress and the President are wholly appropriate when the United States is at war with foreign foes. In a time of war, the federal government must use force to prevent the enemy, whether a foreign state or a terrorist organization, from harming American lives and property. In doing so, it is rational for the government to make distinctions between citizens and enemies in the use of force, as well as in detentions and punishment.

c. Finally, the MCA's jurisdictional provision comports with international law, and, in any event, is enforceable regardless of international law. The accused cites no precedent whatsoever for the proposition that international law forbids the United States from making rational distinctions between citizens and aliens. Were that astonishing conclusion true, numerous Supreme Court decisions would have been overturned by the accused's all-powerful vision of international law. Even if international law required some system of military commissions different from that authorized by the MCA, the accused has not cited a single case standing for the proposition that Congress is bound by international law. Because Congress is bound, not by international law, but by the *Constitution*, and because Congress has unambiguously legislated on the subject at hand, the accused's analysis of international law is irrelevant here. The motion to dismiss all charges for lack of jurisdiction should be denied.

4. Burden and Persuasion: The Prosecution bears the burden of demonstrating the factual basis for jurisdiction by a preponderance of the evidence. *See* Rule for Military Commissions ("RMC") 905(c)(2)(B).

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation.

e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

f. In or about July 2002, the accused planted IEDs in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See id.*, attachment 4..

h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.

i. The accused and three other individuals decided not to surrender and instead "vowed to die fighting." *Id.*

j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*

k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.

l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting IEDs while wearing civilian attire. *See id.*, attachment 4.

m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.

n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded "to kill U.S. forces." *Id.*, attachment 6.

o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*

p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a $1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

s. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that the accused is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:

a. An alien enemy combatant, such as the accused, held outside the sovereign borders of the United States has no rights under the Due Process Clause.

i. The Supreme Court has squarely held that alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the Due Process Clause.[1] For example, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—who were captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no rights under the Fifth Amendment, *see id.* at 782-85. This is so because the prisoners "at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-78 (emphasis added).

ii. The Court further noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in "a more protected position than our own soldiers," who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. Presumably, if the equal protection component of the Due Process Clause had applied to the alien enemy combatants in *Eisentrager*, they would have had a right to trial in an Article III court—a privilege not afforded to even members of our Armed Forces. *See, e.g., Humphrey v. Smith*, 336 U.S. 695 (1949). The Court easily rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and held instead that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States. *See id.* at 784-85 ("Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or

[1] Although the Fifth Amendment does not have an equal protection clause, the Supreme Court has held that its Due Process Clause contains an equal protection component. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution").

apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.") (citation omitted).

iii. Forty years later, the Supreme Court reaffirmed its conclusion that nonresident aliens outside United States sovereign territory have no constitutional rights, and explained that "[n]ot only are history and case law against [the alien], but as pointed out in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (rejecting the contention "that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution"). Similarly, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court confirmed that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* at 693 (citing *Verdugo-Urquidez* and *Eisentrager*); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."). Following these precedents, the U.S. Court of Appeals for the D.C. Circuit consistently has held that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

iv. Furthermore, even when an alien is found within United States sovereign territory, the alien's lack of *voluntary* connection to the Nation denies him protection under the Constitution. As the Supreme Court explained in *Eisentrager*, the alien has been accorded an "ascending scale of rights as he increases his identity with our society," 339 U.S. at 770, and the privilege of litigation has been extended to aliens "only because permitting their presence in the country implied protection," *id.* at 777-78. Thus, an alien seeking constitutional protections must establish not only that he has come within territory over which the United States has sovereignty, but also that he has developed substantial voluntary connections with this country. *See Verdugo-Urquidez*, 494 U.S. at 271-72; *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.") (citing cases). In *Verdugo-Urquidez*, the Supreme Court held that a nonresident alien, who had no previous significant voluntary connection with the United States and was involuntarily transported to the United States and held against his will, had no Fourth Amendment rights with respect to the search of his property abroad by U.S. agents. 494 U.S. at 271. The Court reasoned that "this sort of presence [in the United States]—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country." *Id.* (emphasis added).

v. In light of these principles, the accused cannot credibly claim any constitutional protections, including those of the equal protection component of the Due Process Clause. The accused is an alien who has no voluntary connection to the United States. Furthermore, he is detained at Guantanamo Bay, Cuba, and it is clear that Guantanamo is outside the sovereign territory of the United States. As the Supreme Court noted in *Rasul v. Bush*, 542 U.S. 466 (2004), under the 1903 Lease Agreement executed between the United States and Cuba, "'the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba* over the [leased areas],' while 'the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.'" *Id.* at 471 (emphasis added; other alterations in original) (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (6 Bevans 1113) ("1903 Lease")). Indeed, in framing the question before it for review, the Court in *Rasul* expressly recognized a distinction between "ultimate sovereignty" and "plenary and exclusive jurisdiction" at Guantanamo.[2] 542 U.S. at 475 (internal quotation marks omitted); *see id.* ("The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"). *Cf. United States v. Spelar*, 338 U.S. 217, 221-22 (1949) (lease for military air base in Newfoundland "effected no transfer of sovereignty with respect to the military bases concerned"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81 (1948) (U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States sovereignty).[3]

vi. Despite the accused's suggestion that *Rasul* extended constitutional rights to alien enemy combatants held at Guantanamo Bay, Cuba, *Rasul* did nothing of the sort. The *Rasul* Court's determination that persons detained at Guantanamo are "within 'the territorial jurisdiction' of the United States," 542 U.S. at 480, was only with respect to the habeas statute, and *not* with respect to rights guaranteed by the Constitution: "Considering that [28 U.S.C.] § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that *Congress* intended the *statute's* geographical coverage to vary depending on the detainee's citizenship." *Id.* at 481 (emphasis added). Thus, *Rasul*'s holding was clearly limited to whether Congress intended a federal statute to cover aliens held at a place such as Guantanamo, and said nothing as to whether the *Framers* could ever have intended the *Constitution* to apply extraterritorially in such circumstances. *See id.* at 475-79, 484; *see also Rasul v. Myers*, No. 06-5209, slip op. at 31 (D.C. Cir. 11 Jan. 2008) ("[I]n *Rasul*, the Supreme Court, significantly, did not reach the issue of whether Guantanamo detainees possess

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[2] Indeed, the 1903 Lease prohibits the United States from establishing certain "commercial" or "industrial" enterprises over Guantanamo, a restriction wholly inconsistent with control congruent with sovereignty. *See* 1903 Lease, art. II.

[3] It is worth noting that the Guantanamo Bay lease with Cuba gives the United States "substantially the same rights as it has in the Bermuda lease" that was held in *Connell* to describe territory *outside* United States sovereignty. *Connell*, 335 U.S. at 383.

constitutional rights and instead based its holding on 28 U.S.C. § 2241 only.") (citing *Rasul*, 542 U.S. at 478-84).

vii. By contrast, with respect to the *Constitution*, the Supreme Court has clearly, and repeatedly, held that alienage *is* a relevant factor in determining whether constitutional rights should be extended extraterritorially. As the Supreme Court noted in *Eisentrager*, "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." 339 U.S. at 769; *see also Verdugo-Urquidez*, 494 U.S. at 273 (rejecting the contention "that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution"); *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). Moreover, "even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens," *Eisentrager*, 339 U.S. at 769, to say nothing of alien enemies. Indeed, "[a]t common law 'alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war.' [1 Blackstone * 372, 373]." *Id.* at 775 n.6 (second alteration in original) (quoting *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946)) (internal quotation marks omitted); *see also Case of the Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 776 (C.P.) (petitioners were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus"); *Moxon v. The Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793) (courts "will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty").

viii. Accordingly, alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no constitutional rights. *See, e.g.*, *Eisentrager*, 339 U.S. at 784-85. Moreover, even if the U.S. naval base at Guantanamo Bay, Cuba, were deemed for constitutional purposes to be U.S. territory—contrary to the lease agreement itself—nonresident aliens held there would still lack constitutional rights since they do not have the sort of *voluntary* contacts with the United States required to give rise to rights under the U.S. Constitution. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 271 ("[T]his sort of presence—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country.") (emphasis added); *Jifry*, 370 F.3d at 1182 ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.").

ix. Both the D.C. Circuit in *Boumediene v. Bush* and the military judge in *United States v. Hamdan* have already rejected the novel claim that mere detention at Guantanamo Bay, Cuba, entitles one to protection under the Constitution. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3067 (2007);

United States v. Hamdan, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, slip op. at 10 (Mil. Comm'n 19 Dec. 2007) (Allred, J.) (attached hereto as Attachment A). In *Boumediene*, the D.C. Circuit concluded that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of [constitutional rights]." 476 F.3d at 992. The *Boumediene* court further cited numerous Supreme Court and D.C. Circuit precedents that "foreclose[d] the detainees' claims to constitutional rights." *Id.* (citing cases). In addition, the court in *Boumediene* specifically rejected the argument that *Rasul* somehow compels a different result. *See id.* at 992 n.10 ("The *Rasul* decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager*. Even if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager*."). The D.C. Circuit has direct review over this court, *see* 10 U.S.C. § 950g, and its decisions are binding. *See also Rasul*, No. 06-5209, slip op. at 32 ("*Boumediene* does not conflict with *Rasul* and remains the law of this Circuit."); *cf. Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). This court need proceed no further to reject the accused's claim that his equal protection rights under the Constitution have been violated.[4]

x. Finally, we emphatically reject the accused's claim that this commission should hold proceedings in abeyance until the Supreme Court decides *Boumediene*. Both *Eisentrager* and *Boumediene* remain binding law on this commission, and there is no need to stay proceedings while the Supreme Court examines *Boumediene*. In addition, the numerous precedents on which *Boumediene* relied remain binding law on this commission. *See Boumediene*, 476 F.3d at 992 (citing cases). Finally, we note that the D.C. Circuit itself has rejected the accused's suggested approach of staying proceedings, and has instead continued to decide detainee cases while *Boumediene* remains on review. *See, e.g., Rasul*, No. 06-5209, slip op. at 32 n.15 ("*Boumediene* is currently before the Supreme Court on certiorari review. Nevertheless, we must follow Circuit precedent until and unless it is altered by our own *en banc* review or by the High Court.") (citations omitted). This commission should therefore reject the accused's motion to dismiss all charges for lack of jurisdiction based on the equal protection component of the Due Process Clause, as the accused has no rights under either the Constitution in general or the Due Process Clause in particular.

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[4] As previously noted, Judge Allred has rejected equal protection arguments in the *Hamdan* military commission:

> Because the jurisdiction of the military commission is limited to "alien" unlawful enemy combatants, the Defense challenges its Constitutionality as a violation of the equal protection clause of the United States Constitution. . . . [T]he United States Court of Appeals for the D.C. Circuit, under which the review of military commissions falls, has expressly ruled that the United States Constitution does not protect detainees at Guantanamo Bay. The accused's challenge to the exercise of jurisdiction as a violation of the equal protection clause must likewise fail.

Hamdan, Ruling on Motion to Dismiss for Lack of Jurisdiction, slip op. at 10.

b. Even if the accused somehow possesses constitutional rights under the equal protection component of the Due Process Clause, the Military Commissions Act's application only to *alien* unlawful enemy combatants is a rational distinction when the United States is at war with foreign enemies.

i. The Military Commissions Act provides that military commissions authorized thereby may try only "alien unlawful enemy combatants." 10 U.S.C. § 948d(a).[5] The MCA's distinction between citizens and aliens, and its extension of jurisdiction only to the latter, is a rational distinction in light of the Government's legitimate obligation to punish those who are at war with the United States and its allies who commit violations of the laws of war and other offenses triable by military commission.

ii. The accused, however, asserts that aliens are a suspect class, citing *Graham v. Richardson*, 403 U.S. 365 (1971), and *Toll v. Moreno*, 458 U.S. 1 (1982). *Graham*, however, stands for a substantially narrower point: that *lawful, resident* aliens may be a suspect class for equal protection purposes with respect to state legislation, and that state policies that differentiate within that group or between that group and other similarly situated persons are subject to "close judicial scrutiny." *Graham*, 403 U.S. at 372. Similarly inapposite is *Toll*, which considered only whether an in-state tuition policy violated the Supremacy Clause, and did not consider whether aliens were a suspect class. *See* 458 U.S. at 9-10 ("[W]e hold that the University of Maryland's in-state policy, as applied to G-4 aliens and their dependents, violates the Supremacy Clause of the Constitution, and on that ground affirm the judgment of the Court of Appeals. *We therefore have no occasion to consider whether the policy violates the Due Process or Equal Protection Clauses.*") (emphasis added) (footnote omitted).[6] Nothing in these cases suggests that the Supreme Court meant to provide heightened scrutiny for the claims against the federal government of nonresident alien enemy combatants captured on a foreign battlefield and held outside the sovereign borders of the United States: "We did not decide in *Graham* nor do we decide here whether special circumstances, such as armed hostilities between the United States and the country of which an alien is a citizen, would justify the use of a classification based on alienage." *In re Griffiths*, 413 U.S. 717, 722 n.11 (1973); *see also Verdugo-Urquidez*, 494 U.S. at 273 (rejecting nonresident alien's reliance on *Graham*).

iii. Although the MCA's jurisdiction extends to both resident and nonresident aliens, the accused, as a nonresident alien, has no standing to allege an equal protection violation on behalf of resident aliens. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979); *see also United*

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[5] The MCA defines an "alien" as "a person who is not a citizen of the United States." 10 U.S.C. § 948a(3).

[6] The only member of the majority in *Toll* who took a position on the Equal Protection Clause of the Fourteenth Amendment was Justice Blackmun, *see id.* at 19-24 (Blackmun, J., concurring), and he was sharply challenged by two justices in dissent, *see id.* at 39 (Rehnquist, J., dissenting, joined by Burger, C.J.) ("[I]t is clear that not every alienage classification is subject to strict scrutiny.").

States v. Salerno, 481 U.S. 739, 745 (1987). Were the accused's equal protection challenge considered on behalf of the broader class of resident aliens, however, it would still be subject only to rational basis review. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). Under that lenient standard, the jurisdictional provision of the MCA must be upheld as long as a court can identify a rational basis for it in service of a legitimate government objective. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000) ("As we have explained, when conducting rational basis review 'we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.'") (alterations in original) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

iv. The precedents cited by the defense apply heightened scrutiny to *state* policies regarding aliens, as opposed to policies promulgated by the federal government. The Supreme Court, however, has made clear that *federal* policies regarding aliens are entitled to a much higher degree of deference. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) ("The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'"); *id.* at 86-87 ("Contrary to appellees' characterization, it is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization."); *Graham*, 403 U.S. at 376-77 ("An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations. The National Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.") (internal quotation marks omitted). As the Supreme Court has repeatedly observed:

> [T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. . . . "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Diaz, 426 U.S. at 81 & n.17 (third alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952)); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977).[7]

v. The basis for the Court's deference in *Diaz*—that the regulation of aliens is committed to the federal political branches—is magnified in the present case, which involves the regulation of aliens held as enemy combatants, thus implicating grave war powers, national security and foreign policy concerns. *See Diaz*, 426 U.S. at 81 & n.17; *see also Harisiades*, 342 U.S. at 586, 587 ("Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . . So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.") (footnotes omitted). As the Court in *Eisentrager* recognized,

> even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.

339 U.S. at 769 (footnote omitted); *see also id.* ("Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.").

vi. Distinctions between citizens and aliens drawn by Congress and the President are wholly appropriate when the United States is at war with foreign foes. In a time of war, the federal government must use force to prevent the enemy, whether a foreign state or a terrorist organization, from harming American lives and property. To do so, the government must make distinctions between citizens and enemies in using

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[7] The accused cites *Wong Wing v. United States*, 163 U.S. 228 (1896), and *Rodriguez-Silva v. INS*, 242 F.3d 243 (5th Cir. 2001), for the proposition that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States." *Rodriguez-Silva v. INS*, 242 F.3d at 247 (citing *Wong Wing*). As an initial matter, it should be noted that—contrary to the accused's contention that the MCA's jurisdictional provision is subject to strict scrutiny—the court in *Rodriguez-Silva* employed only rational basis review. *Id.*; *see also id.* ("[E]ven though equal protection principles require the same type of analysis under the Fifth and Fourteenth Amendments, the scope of the two protections is not necessarily identical.") (citation omitted). In any event, the court's statement that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States" is generally true with respect to ordinary criminal matters. It is not the case, however, with respect to punishing violations of the law of war and related offenses. Acts of war, unlike acts that are merely criminal, by definition have a foreign source, and it is both appropriate and necessary for the Government to make distinctions between aliens and citizens by the very act of defending our Nation from its enemies and punishing violations of the law of war and related offenses. As such, distinctions between citizens and aliens that might be inappropriate with respect to ordinary criminal matters are rational and appropriate in the context of punishing and deterring war crimes.

force, as well as in detentions and punishment. Acts of war, unlike acts that are merely criminal, by definition have a foreign source, and it is both appropriate and necessary for the Government to make distinctions between aliens and citizens by the very act of defending our Nation from its enemies.

vii. Were the Global War on Terror not primarily foreign in nature, the threat it poses to public safety would be either a criminal problem or an insurrection. But the threat is ultimately a foreign threat, and distinctions between citizen and alien are no less inevitable in war than in immigration law. The equal protection component of the Due Process Clause requires only that Congress have a rational basis before drawing a distinction between citizen and alien in the MCA, and the distinction drawn by the MCA is indeed rational. Nothing in the Constitution requires that aliens and citizens be held to the same standard with respect to acts of war against the United States, *see Harisiades*, 342 U.S. at 586, 587 ("Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . . So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.") (footnotes omitted), and the Constitution permits Congress to approach the trial of enemy combatants in a piecemeal fashion—by legislating only with respect to *alien* unlawful enemy combatants in the MCA and reserving any legislation with respect to citizen enemy combatants for a later day. *See Lee Optical*, 348 U.S. at 489 ("The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.") (citation omitted).

viii. Congress enacted the MCA in the wake of the most serious aggression ever against the United States on its soil by aliens affiliated with a foreign-based terrorist organization. In balancing the national security interests of the United States against the interests of these alien enemy combatants, Congress thought it appropriate to use military commissions—which have traditionally been used to try alien enemies—to bring those combatants to justice in appropriate cases. As the Supreme Court explained in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), such commissions have historically been "convened as an 'incident to the conduct of war' when there is a need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'" *Id.* at 2776 (plurality op.) (quoting *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)).

ix. The MCA authorizes rules of procedure and evidence that are adapted to the practicalities of trying combatants captured on a battlefield half a world away. By enacting the MCA, Congress drew a reasonable distinction between, on the one hand, civilian courts (which will often involve purely domestic crimes) and courts-martial (which will often involve witnesses within the control of the United States), and, on the other hand, military commissions, where rigid "chain of custody" rules for evidence would be unworkable. Similarly, the MCA's rules on classified evidence, *see, e.g.*, 10 U.S.C. § 949d(f), reflect Congress's legitimate concern that military commissions will

frequently involve classified sources and methods, and Congress's commitment that, in a time of war, our Nation's intelligence sources and methods must be protected. The MCA is a reasonable accommodation and balancing of these important interests, and accordingly complies with the equal protection component of the Due Process Clause.

x. In addition, notwithstanding the accused's claim that he is somehow being targeted for inferior treatment before the law, the procedures under which he will be tried are robust and fair, permitting him the assistance of defense counsel, *see* RMC 502(d)(6), 506; a right to discovery, including a right to exculpatory evidence or an adequate substitute if such evidence is classified, *see* RMC 701; the right to take depositions, *see* RMC 702; the right to call witnesses, *see* RMC 703; and many other rights that are carefully described in the Rules for Military Commissions and the MCA, including, for example, the presumption of innocence until proven guilty beyond a reasonable doubt, *see* 10 U.S.C. § 949*l*(c)(1). In addition, the accused will have his case heard before an impartial judge, *see* RMC 902, and will have the right to challenge the impartiality of the members who will decide his guilt, *see* RMC 902. Should the accused be convicted, the convening authority will be authorized to set aside a finding of guilty or to reduce the severity of the offense or punishment; the convening authority may *never* increase the severity of the offense or punishment. *See* RMC 1107. If the accused is convicted, he has the right to have his case reviewed by the Court of Military Commission Review. *See* RMC 1201. Beyond that, the Rules for Military Commissions provide that the accused may petition for his case to be reviewed by the U.S. Court of Appeals for the D.C. Circuit, and even by the U.S. Supreme Court. *See* RMC 1205.

xi. The accused's claim that the MCA unconstitutionally burdens his access to the courts is similarly unavailing. For instance, in *Ludecke v. Watkins*, 335 U.S. 160 (1948), the Supreme Court determined that no constitutional issue existed with respect to the severe restrictions on judicial access and review for a person determined to be an enemy alien with respect to the summary seizure and removal of the alien under the Alien Enemy Act of 1798, 50 U.S.C. § 21. *See* 335 U.S. at 163-64, 170-73; *see also Eisentrager*, 339 U.S. at 775 (citing *Ludecke*). Indeed, none of the cases cited by the accused regarding restrictions on access to courts involves policies related to the access of aliens held as enemy combatants or rationales that would legitimately apply to issues of such access. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Congress's authority (though *not* obligation) to "enforce[] . . . a variety of basic rights, including the right of access to the courts"); *Clark v. Jeter*, 486 U.S. 456 (1988) (statute of limitations with respect to establishing paternity); *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (fees charged to inmates for receiving trial transcripts). And the accused's mere invocation of equal protection principles does not somehow constitutionalize, or transmogrify into a fundamental right, any aspect of court access or judicial review that the accused claims he lacks as a result of the MCA. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) ("It is not the province of [the courts] to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."). In any event, the Rules for Military Commissions provide that the accused may petition for his case to be reviewed by the U.S. Court of Appeals for the D.C. Circuit, and even by the

U.S. Supreme Court, thus providing him with the opportunity to access both military and Article III courts. *See* RMC 1205.

xi. Finally, to the extent the accused's claim that he is being denied access to civilian courts means that Congress may not authorize enemy combatants to be tried by military commissions at all, such a conclusion would squarely contradict the plurality's holding in *Hamdan*, which clearly recognized that military commissions are, and historically have been, "convened as an 'incident to the conduct of war' when there is a need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'" 126 S. Ct. at 2776 (plurality op.) (quoting *Quirin*, 317 U.S. at 28-29). Here, Congress and the President have jointly enacted a system of military commissions to try violations of the law of war and related offenses. *Cf. id.* at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. *Nothing* prevents the President from returning to Congress to seek the authority he believes necessary.") (emphasis added). Such a system, expressly contemplated by virtually all of the justices in *Hamdan*, can surely pose no constitutional threat to the right to access the courts.

c. Not only does the MCA does not violate international law, the Supreme Court has *never* held that international law may invalidate an Act of Congress, such as the MCA.

i. The accused cites no precedent whatsoever for the proposition that international law forbids the United States from making rational distinctions between citizens and aliens. Were that astonishing conclusion true, the Supreme Court's holdings in *Eisentrager*, *Ludecke*, *Diaz*, *Harisiades*, *Verdugo-Urquidez* and countless other cases would somehow have been overturned by the accused's all-powerful vision of international law. In any event, for the reasons already stated, the MCA's distinction between citizens and aliens is rational in light of the distinctions that must necessarily be drawn when fighting a war and punishing violations of the law of war and related offenses.

ii. Moreover, even if international law called for some system of military commissions different from that authorized by the MCA, the accused has not cited a single case standing for the proposition that Congress is bound by international law. As the Supremacy Clause makes clear, it is the *Constitution* that is the supreme law of the land, and not commentary by the International Committee of the Red Cross or any other foreign entity. *See* U.S. Const. art. VI, cl. 2. Further, there is absolutely no doubt that Congress is *not* bound by international law. *See, e.g.*, *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations.

But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that international law is relevant to U.S. courts "where there is no treaty and no controlling executive or legislative act or judicial decision").[8]

iii. Nor does the canon of construction articulated by *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), stand to the contrary. There, the Supreme Court held that an ambiguous statute should be construed, to the extent possible, not to conflict with international law. *See id.* at 118. As the Court of Appeals has explained, however, "[t]his canon of statutory interpretation . . . does not apply where the statute at issue admits no relevant ambiguity." *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). As the accused readily concedes, the MCA unambiguously extends jurisdiction only to *alien* unlawful enemy combatants. *See* 10 U.S.C. § 948d(a). Thus, *Schooner Charming Betsy*'s canon of construction has no applicability.

iv. In the MCA, Congress unambiguously authorized the use of military commissions with respect to alien unlawful enemy combatants. The MCA's jurisdictional provision meets any equal protection principles immanent in international law. Moreover, because Congress is bound, not by international law, but by the *Constitution*, the accused's analysis of international law with respect to the present question is irrelevant. The motion to dismiss all charges for lack of jurisdiction should be denied.

d. Conclusion

i. Alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the equal protection component of the Due Process Clause. Moreover,

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[8] Similarly, even if Common Article 3 were found to contain an equal protection principle, Congress always retains the authority to abrogate or repeal a treaty by a later-enacted statute. *See, e.g., Edye v. Roberston (Head Money Cases)*, 112 U.S. 580, 599 (1884) ("A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. . . . In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [B]ut, if the two are inconsistent, the one last in date will control the other . . . ."). Thus, even if Common Article 3 were somehow in tension with the MCA's jurisdictional requirement, the MCA would be lawful and enforceable, notwithstanding anything in Common Article 3, the Geneva Conventions or any other earlier-enacted treaty to the contrary.

even if the accused somehow possesses constitutional rights, the MCA's application only to *alien* unlawful enemy combatants is a rational distinction when the United States is at war with foreign enemies. Finally, the MCA's jurisdictional provision comports with international law, and, in any event, is enforceable regardless of international law.

7. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the motion to dismiss should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Attachments: The following attachment is electronically merged into this filing:

a. *United States v. Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction (Mil. Comm'n 19 Dec. 2007) (Allred, J.).

12. Submitted by:

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UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	ON RECONSIDERATION RULING ON MOTION TO DISMISS FOR LACK OF JURISDICTION 19 December 2007

After a hearing on 4 June 2007, the Commission granted a Defense Motion to Dismiss for Lack of Jurisdiction. Thereafter, the Government moved the Commission to reconsider that dismissal, and to hear evidence regarding the accused's activities that would make him subject to the jurisdiction of a military commission, i.e. the Government sought to show the Commission directly that the accused was an alien unlawful enemy combatant, as defined in the Military Commissions Act (M.C.A.) §948a(1)(i). The Commission granted the Motion for Reconsideration, and a hearing was held at Guantanamo Bay on 5 and 6 December 2007, at which the Government presented testimonial evidence from Major Hank Smith, U.S. Army, FBI Special Agent George Crouch, and DoD Special Agent Robert McFadden. The Defense offered the testimony of Professor Brian Williams of the University of Massachusetts at Dartmouth, Mr. Said Boujaadia, a detainee being held at Guantanamo Bay, and the stipulated testimony of Mr. Nasser al Bahri of Sana'a, Yemen. Both sides offered documentary and photographic evidence. The Defense concedes that Mr. Hamdan is an "alien" for purposes of the Motion.

The Commission received and considered the *Amicus Curiae* brief filed by Frank Fountain, Madeline Morris and the Duke Guantanamo Defense Clinic.

Having considered this evidence, the Commission finds that the following facts are true:

1. In 1996, the accused was recruited in Yemen to go to Tajikistan for jihad. As a result of difficulty crossing the border into Tajikistan, he remained in Afghanistan. Because of his experience driving vehicles, he soon came in contact with Osama bin-Ladin, and was offered work as a driver.

2. The accused began his work driving farm vehicles on bin-Ladin's farms, and after a probationary period, was invited to join the bin-Ladin security detail as a driver of one of the security caravan vehicles. With the passage of additional time, the accused became bin-Ladin's personal driver sometime in 1997, and continued in that capacity until the fall of 2001.

3. On occasion, the accused also served as a personal bodyguard to bin-Ladin. It was customary to rotate bodyguards as a security measure, and the accused engaged in this rotation. Bodyguards not actually protecting bin-Ladin would serve as fighters, receive training at al-Qaeda training camps, serve as emirs of al-Qaeda guesthouses, and perform other duties during their rotations away from body guarding duties.

4. During this period as bin-Ladin's personal driver and sometimes bodyguard, the accused pledged *bayat*, or "unquestioned allegiance" to bin-Ladin. The *bayat* extended to bin-Ladin's

campaign to conduct jihad against Jews and crusaders, and to liberate the Arabian Peninsula from infidels, but the accused reserved the right to withdraw his *bayat* if bin-Ladin undertook a mission he did not agree with. The accused told investigators after his capture that there were some men in bin-Ladin's company who did not agree with everything bin-Ladin did or proposed to do.

5. The accused was aware of two of bin-Ladin's *fatwas*, including the 1998 fatwa issued by the International Islamic Front for Jihad against the Jews and Crusaders, and which called upon all Muslims to "kill Americans and their allies, both civilian and military . . . in any country where it is possible, to liberate Al-Aqsa Mosque and the Holy Mosque from their grip, and to expel their armies from all Islamic territory ..."

6. During the years between 1997 and 2001, the accused's duties sometimes included the delivery of weapons to Taliban and other fighters at bin-Ladin's request. On these occasions, he would drive to a weapons warehouse, present a document that contained bin-Ladin's order, and his vehicle would be loaded with the required weapons. He then delivered the weapons to fighters or elsewhere as directed by bin-Ladin. On at least one occasion, he took weapons to an al-Qaeda base in Kandahar.

7. As bin-Ladin's driver and bodyguard, the accused always carried a Russian handgun. It is not unusual for men in Afghanistan to carry weapons, and the accused had a Taliban-issued permit to carry weapons when he was apprehended. His duty in case of attack was to spirit bin-Ladin to safety, while the other vehicles in the convoy were to engage the attackers.

8. The accused received small arms and other training at al-Farouq training camp.

9. The accused became aware, after the al-Qaeda attacks on the U.S. embassies in Africa, and after the USS Cole attack, that bin-Ladin and al-Qaeda had planned and executed those attacks. No evidence was presented that the accused was aware of the attacks in advance, or that he helped plan or organize them.

10. Osama bin-Ladin told the accused that he wanted to demonstrate that he could threaten America, strike fear, and kill Americans anywhere. On hearing this declaration, the accused felt "uncontrollable enthusiasm."

11. In the days before 9/11, Osama bin-Ladin told the accused to get ready for an extended trip. After the 9/11 attacks, the accused drove bin-Ladin and his son on a ten-day jaunt around Afghanistan, visiting several cities, staying in different homes or camping in the desert, and otherwise helping bin-Ladin escape retaliation by the United States. During this period, he learned that bin-Ladin had been responsible for the attacks.

THE ANSAR BRIGADE

12. Between the early 1990's and the fall of 2001, there was in Afghanistan a bona fide military fighting force composed primarily of Arabs, known as the Ansars. This force engaged the

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Soviets during their occupation of Afghanistan. They were subject to a rigid command structure, were highly disciplined, usually wore a uniform (or uniform parts), and carried their arms openly. The Ansar uniforms usually consisted of either completely black attire or traditional military camouflage uniform parts.

13. Taliban leaders did not permit the Ansars to operate independently. As a result, the Ansars were integrated with, subject to the command of, and usually formed the elite fighting troops of, the Taliban army.

14. The Taliban had a conventional fighting force that may well be described as a traditional army. They possessed aged-but-functional battle tanks, helicopters, artillery pieces and fighter aircraft. The Ansars comprised up to 25% of the Taliban army.

15. Osama bin-Ladin contributed forces to the Ansars, and provided them with weapons, funding, propaganda and other support.

16. By 1997, al-Farouq training camp, and several other training camps, were under the symbolic control of bin-Ladin.

17. The Ansars were primarily motivated by the desire to expel the Soviets and other foreigners from Afghanistan, but also fought against the Northern Alliance. Some of the Ansar units rejected bin-Ladin's calls for war against America, and the attacks of 9/11.

18. During the U.S. invasion of Afghanistan in the fall of 2001, the Ansars were engaged in the defense of Kandahar.

24 NOVEMBER 2001

19. On 24 November 2001, U.S. forces were operating in the vicinity of Takta Pol, a small Afghan village astride Highway 4, which ran between Kandahar and the Pakistani border. Major Hank Smith had under his command a small number of Americans and six to eight hundred Afganis he referred to as his Anti-Taliban Forces (ATF). Their mission was to capture Takta Pol from the Taliban and prevent arms and supplies from Pakistan from entering Kandahar by means of Highway 4.

20. Highway 4 was the main, and perhaps the only, road between Kandahar and the Pakistan border. It was a significant supply route for people and materials transiting between Pakistan and Kandahar.

21. During the battle for control of Takta Pol and Highway 4, U.S. and coalition forces fought all night with the Taliban forces in the area. A U.S./ATF negotiating party attempting negotiations under a flag of truce was ambushed by Taliban forces, and the U.S. and coalition troops engaged the Taliban in combat, taking casualties. The Taliban forces engaged against coalition forces at Takta Pol did not wear uniforms or any distinctive insignia.

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22. After an overnight battle on 23-24 November, the Taliban vacated the town, and coalition forces entered Takta Pol the morning of 24 November 2001. They swept and secured the town, and set up a road block south of town to intercept troops, munitions or other war materials, and explosive vehicles before they entered the town. The road block was also intended to prevent munitions and war materials from being carried toward Kandahar.

23. After capturing the town of Takta Pol, and while securing the town and establishing his road blocks, Major Smith and his ATF continued to receive rocket or mortar fire from outside the town.

24. At the same time, Kandahar to the north was occupied by a large number of Taliban forces. Coalition forces, including Major Smith's forces, were preparing to participate in a major battle for control of Kandahar, which was already under way.

25. During the late morning or early afternoon of 24 November, a vehicle stopped at the road block engaged Major Smith's ATF in gunfire. Two men, apparently Egyptians, from the vehicle were killed, and an occupant later identified as Mr. Said Boujaadia was captured.

26. On hearing the gunfire, Major Smith proceeded to the road block, arriving within 3-15 minutes of the firing. By the time he arrived, the accused, driving a different vehicle, had also been stopped at the roadblock. His vehicle carried two SA-7 missiles, suitable for engaging airborne aircraft. The missiles were in their carrying tubes, and did not have the launchers or firing mechanisms with them.

27. The accused was captured while driving north towards Kandahar from the direction of the Pakistani border. The vehicle carrying Mr. Boujaadia and the two Egyptian fighters was also traveling north, towards Kandahar when it was stopped.

28. The only operational aircraft then in the skies were U.S. and coalition aircraft providing close air support and other support for coalition troops on the ground.

29. Major Smith's ATF did not have any surface-to-air missiles in their inventory because the Taliban had no operational aircraft in the skies. There was no need for missiles that had no target.

30. After consulting with higher headquarters, Major Smith's forces photographed the two missiles on the tailgate of one of their vehicles, and destroyed the missiles to prevent them or their explosives from being used against Coalition forces.

31. Major Smith took control of the accused from the Afghan forces who, he feared, would kill the accused if he remained in their control. The accused was fed, protected and otherwise cared for while he was in U.S. custody. A Medic checked on him several times a day, and Major Smith visited him at least once a day until he was evacuated by helicopter a few days after his capture.

32. At the time of his capture, the accused was wearing traditional Afghan civilian clothes, and nothing suggestive of a uniform or distinctive emblem.

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DISCUSSION OF LAW

The personal jurisdiction of a military commission is limited to those who are found to be "alien unlawful enemy combatants," defined in the M.C.A. as those who have "engaged in hostilities or who ha[ve] purposefully and materially supported hostilities against the United States or its co-belligerents, who [are] not a lawful enemy combatant[s]. . . ." M.C.A. §948a(1)(i). Mr. Hamdan may only be tried by this Commission if he falls within this definition. The burden is on the Government to demonstrate jurisdiction over the accused by a preponderance of the evidence R.M.C. 905(c)(1). This Commission assumes that Congress intended to comply with the International Law of Armed Conflict when it enacted the Military Commissions Act and chose this definition of "unlawful enemy combatant". *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

International Law scholars and experts have long debated the exact meaning of Law of Armed Conflict terms such as "hostilities" and "direct participation". Professor Dinstein explains "It is not always easy to define what active participation in hostilities denotes. Usually, the reference is to 'direct' participation in hostilities. However, the adjective 'direct' does not shed much light on the extent of participation required. For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities." Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 27 (Oxford University Press 2004).

It is ironic that Professor Dinstein should have chosen the "driver delivering ammunition to combatants" as his example of someone who is obviously taking an active part in hostilities. Other scholars have debated the scenario of a driver delivering ammunition, and held that the issue of 'direct participation' should depend on how close the driver actually is to the ongoing hostilities. *See* International Committee of the Red Cross, *Summary Report, Third Expert Meeting on the Notion of Direct Participation in Hostilities,* Geneva, 32-33, (2005), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf. where one expert argued that "a distinction had to be made between driving the same ammunition truck close to the front line, which would constitute "direct" participation, and driving it thousands of miles in the rear, which would not." Even after making this distinction, it is widely acknowledged that driving "close to the front line" is direct participation.

Writing in the Chicago Journal of International Law, Professor Michael Schmitt acknowledges that the meaning of direct participation is "highly ambiguous." He concludes, however, that 'The Commentary appears to support the premise of a high threshold: "[d]irect participation in hostilities implies a *direct causal relationship* between the activity engaged in and the *harm done* to the enemy at the *time and the place where the activity takes place.*" It also describes direct participation as "acts which by their nature and purpose are *intended to cause actual harm* to the personnel and equipment of the armed forces" and defines hostilities as "acts of war which are intended by their nature or their purpose to *hit specifically* the personnel and the matériel of the armed forces of the adverse Party." ' Michael N. Schmitt, *Direct Participation*

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in Hostilities by Private Contractors or Civilian Employees, Chicago Journal of International Law, 511, 531, 533 (2004)(internal citations omitted; italics in original).

Jean-Francois Quguiner, in a working paper sponsored by Harvard University's Program on Humanitarian Policy and Conflict Research, addresses the term "direct participation" as contained in Article 51 of Additional Protocol I to the Conventions, and notes that direct participation has been held to be broad enough to encompass "direct logistical support for units engaged directly in battle such as the delivery of ammunition to a firing position." Jean-Francois Quguiner, *Direct Participation in Hostilities Under International Humanitarian Law* 4 (2003), http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf.

APPLICATION AND CONCLUSION

The Commission finds that "hostilities" were in progress on the 24th of November 2001 when the accused was captured with missiles in his car. Major Smith and his Anti-Taliban Forces were actively engaged in a firefight with Taliban forces on the night of 23-24 November, had taken casualties, and had been attacked while attempting to negotiate under a flag of truce. Even after capturing the town of Takta Pol and while securing it, they continued to receive mortar or rocket fire from troops in the distance. In addition, the Battle of Kandahar was already under way, with a larger contest expected in the near future, for control of the city. Both the local battle for control of Takta Pol and the ongoing battle for the more distant Kandahar amount to "hostilities."

The Commission also finds that the accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations. The fact that U.S. and coalition forces had the only air assets against which the missiles might have been used supports a finding that the accused actively participated in hostilities *against the United States and its coalition partners.* Although Kandahar was a short distance away, the accused's past history of delivering munitions to Taliban and al-Qaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of "direct participation." If the two vehicles stopped within minutes of each other at Major Smith's road block were in fact traveling together, a point of dispute during the hearing, it is arguable that the accused was also traveling towards the battle in the company of enemy fighters. Taken together, the evidence presented at the hearing supports a finding that the accused "engaged in hostilities, or . . . purposefully and materially supported hostilities against the United States or its co-belligerents...." M.C.A. §948a(1)(i).

The Government also argues that the accused "purposefully and materially supported hostilities" by (1) serving as the personal driver and bodyguard of the al-Qaeda mastermind Osama bin-Ladin, (2) continuing to work for bin-Ladin after he became aware that bin-Ladin had planned and directed the USS Cole bombing, the attacks on the two U.S. Embassies in Africa, and the 9/11 attacks on the United States; and (3) by driving bin-Ladin around Afghanistan after the attacks of 9/11, in an effort to help him avoid detection and punishment by the United States. While these arguments may well provide grist for the debates of future generations of Law of

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Armed Conflict Scholars, the Commission does not reach them here. Having found that the accused drove a vehicle to and towards the battle field, containing missiles that could only be used against the United States and its co-belligerents, the Commission finds that the accused meets the first half of the definition of unlawful enemy combatant.

The final element of M.C.A. §948a.(1)(i)'s definition of alien unlawful enemy combatant is that the accused must not have been "a lawful combatant." The M.C.A. defines "lawful combatant" in §948a(2) to include:

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

The Defense does not argue that the accused is entitled to lawful combatant status under any of these alternatives. After an examination of the evidence presented, the Commission agrees. Alternatively, the Defense has urged the Commission to find the accused entitled to lawful combatant/ Prisoner of War status under alternative definitions contained in the Third Geneva Convention.

ARTICLE 5 STATUS ISSUE

This Commission has elsewhere granted a Defense Motion to determine the accused's status under Article 5 of the Third Geneva Convention. The Defense has argued that the accused may have been a lawful combatant, and therefore entitled to Prisoner of War status, under any of the following subsections of Article 4.A of the Third Geneva Convention:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: [recitation of the conditions is omitted here].

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall

[redacted]

provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law,

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The Commission has searched carefully through the evidence presented by the Defense, and finds nothing that would support a claim of entitlement to lawful combatant or Prisoner of War Status under options (1) or (2) above. While the Defense showed, through the testimony of Professor Williams, that the Ansars were "members of the armed forces of a Party" or members of a militia or volunteer corps "forming part of such armed forces" there is no evidence that the accused was a member of the Ansars or any other militia or volunteer corps.

Nor is there any evidence before this Commission suggesting that the accused qualifies for Prisoner of War status under option (4) a civilian accompanying the armed forces. He fails to fit into any of the suggested categories of civilians who might properly accompany the armed forces, or any similar categories of persons, there is no evidence that he "accompanied" such forces, or that he was properly identified as required by the rule. Indeed, it is clear that even civilians who fall into this category can forfeit their entitlement to prisoner of war status by directly participating in hostilities.

With respect to categories (5) and (6) above, there is likewise no evidence that the accused was a member of a merchant marine or civil aircraft crew, or that he engaged in the traditional *levee-en-masse.* The Commission is left to conclude that the accused has not presented any evidence from which it might find that he was a lawful combatant, or that he is entitled to Prisoner of War Status under any Geneva Convention Category. The Commission concludes, then, that he is an alien unlawful enemy combatant, and not a lawful combatant entitled to Prisoner of War protection. The accused is subject to the jurisdiction of this Commission.

CONSTITUTIONAL ARGUMENTS

Notwithstanding this finding of jurisdiction under the Military Commissions Act and the Law of International Armed Conflict, the Defense has raised three Constitutional objections to this Commission's exercise of jurisdiction over him. These are summarized briefly below:

Ex Post Facto: The Defense argued, in its May 2007 Motion to Dismiss, that it would be a violation of the Constitutional prohibition against *ex post facto* laws to give a Combat Status Review Tribunal (CSRT) determination "additional force after the fact," by making them determinative of the accused's status before a military commission. Motion to Dismiss at 11.

[redacted]

The Defense objected that when Congress passed the M.C.A., and retroactively expanded the effect of a CSRT determination, it deprived detainees of the defense of lawful combatancy by making the CSRT finding "determinative" of military commission jurisdiction over the accused. The Defense also argued that subjecting a detainee to military commission jurisdiction constitutes a "punishment" because it subjects a defendant to "higher penalties and disadvantageous evidentiary rules, among other limits on due process." The Defense argued that Mr. Hamdan did not know at the time of the CSRT that its determination would be used to subject him to a criminal proceeding before a military commission, and thereby deprived him of a meaningful opportunity to contest the evidence.

The Court notes at the outset that the United States Court of Appeals for the D.C. Circuit has held that the Constitution of the United States does not protect detainees held at the U.S. Naval Base, Guantanamo Bay. *Boumediene v. Bush 375 U.S. App. D.C. 48 (2007).* In that case, the Court of Appeals concluded a lengthy discussion about the entitlement of aliens to Constitutional rights with this summary: "Precedent in this circuit also forecloses the detainees' claims to constitutional rights. In Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev'd on other grounds sub nom. Christopher v. Harbury,* 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy*, 107 U.S. App. D.C. 372, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam), that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of this circuit is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 337 U.S. App. D.C. 106, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. U.S. Dep't of State,* 352 U.S. App. D.C. 93, 292 F.3d 797, 799 (D.C. Cir. 2002). In light of this holding, all of the Defense's arguments are deemed to be without merit" (*emphasis in original*). In light of this current state of the law in the Circuit under which military commissions are reviewed, all of this accused's Constitutional arguments are also deemed to be without merit.

Beyond this, the Commission finds that the *ex post facto* violations the Defense complains of have been cured by the Commission's refusal to accept the October 2004 CSRT finding as binding, and by holding its own hearing to determine whether the accused would be subject to the jurisdiction of a military commission. At that hearing, the accused was represented by no less than six counsel, had the benefits of an open and public proceeding before a military judge, and at which representatives of the world press, Human Rights groups, and organizations interested in the application of International Humanitarian Law were present. He confronted the witnesses against him, called and presented his own witnesses, and persuaded the Commission to hold open the receipt of evidence so an additional witness on his behalf could be heard. It has long been a principle of the International Law of Armed Conflict that unlawful combatants may be tried for their participation in hostilities by the courts of the Detaining Power, and the United States' determination to exercise this right against Mr. Hamdan does not involve surprise or the ex post facto application of the laws. Schmitt, *supra,* at 521. The Defense argument against the exercise of jurisdiction on the basis of the *ex post facto* clause is rejected.

Bill of Attainder: The Defense also argued, in its May 2007 Motion to Dismiss, that the Bill of Attainder Clause "prevents the MCA from authorizing a non-judicial finding of unlawful combatant status." Defense Motion at 12. This objection, in the Commission's view, is likewise mooted by the evidentiary hearing held in Guantanamo Bay on 5-6 December. There has been no "non-judicial" finding of unlawful combatant status. There has been no legislative finding that any specific group is unlawful. This Commission, having heard the evidence in a public trial, has determined that the accused is an alien unlawful enemy combatant, subject to the jurisdiction of a military commission, in a 'regularly constituted court, affording all the necessary "judicial guarantees which are recognized as indispensable by civilized peoples."' There is no merit to this argument.

Equal Protection: Because the jurisdiction of the military commission is limited to "alien" unlawful enemy combatants, the Defense challenges its Constitutionality as a violation of the equal protection clause of the United States Constitution. In support of its claim, the Defense cites, *inter alia*, *Graham v. Richardson,* 403 U.S. 365, 371 (1971); *In re Griffiths*, 413 U.S. 717, 721-22 (1973). As before, the United States Court of Appeals for the D.C. Circuit, under which the review of military commissions falls, has expressly ruled that the United States Constitution does not protect detainees at Guantanamo Bay. The accused's challenge to the exercise of jurisdiction as a violation of the equal protection clause must likewise fail.

CONCLUSION

The Government has carried its burden of showing, by a preponderance of the evidence, that the accused is an alien unlawful enemy combatant, subject to the jurisdiction of a military commission. The Commission has separately conducted a status determination under Article 5 of the Third Geneva Convention, and determined by a preponderance of the evidence that he is not a lawful combatant or entitled to Prisoner of War Status. There being no Constitutional impediment to the Commission's exercise of jurisdiction over him, the Defense Motion to Dismiss for Lack of Jurisdiction is DENIED. The accused may be tried by military commission.

So Ordered this 19th day of December, 2007.

Keith J. Allred
Captain, JAGC, U.S. Navy
Military Judge

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**D014** **Defense Reply to Prosecution Response to Defense Motion to Dismiss All Charges (Equal Protection)** 24 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Facts:** This motion presents a question of law.[1]

3. **Overview:**

a. As discussed in Mr. Khadr's motion, the requirement that the law be applied equally to all persons is a fundamental tenet of the United States Constitution. While the Fifth Amendment's equal protection guarantee permits the Government to discriminate among classes of similarly situated people in certain circumstances, it cannot do so unless it has a sufficiently weighty reason. No such reason is present here. Supreme Court precedent establishes that when seeking to treat aliens differently from similarly situated others, the Government must have a compelling justification for doing so, and the actions it takes must be narrowly tailored to serve that end. The MCA's differential treatment of citizens and non-citizens fails this test, because the Government has not asserted even a legitimate, let alone compelling, interest in subjecting aliens and *only* aliens to trial by military commission.

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[1] The Government's briefs in response to this motion and nearly every other motion the Defense has filed with the commission to date include a number of "facts" (a characterization with which the Defense does not agree) without obvious relevance to any of the legal issues raised by this or any other defense motion. The factual allegations appear to be derived largely from materials marked "FOUO" and/or "law enforcement sensitive" and thus subject to the Commission's protective order #001. Indeed, the motions submitted by the Defense since 11 December 2007 are, in theory, "law" motions capable of resolution without comprehensive discovery. This, as the military judge may recall, was the Government's justification for compelling resolution of these motions now, before the Defense has had the opportunity to conduct comprehensive discovery in this case.

The Government's decision to include these factual allegations in their response briefs necessarily compels one of two conclusions: either (1) the Defense motions are, contrary to the Government's earlier expressed view, not truly "law" motions -- further factual development is necessary, in which case the Defense has been prejudiced by having to file these motions now; or (2) these allegations are not germane to the legal issues presented by the motions, in which case the Government included these allegations seemingly for no other purpose than to improperly influence the tribunal or escape the restrictions of protective orders the Government sought from the Military Commission for the purpose of influencing the public. It is difficult to hypothesize a third possibility.

b. The Government attempts to divert attention from this failure by arguing that aliens detained in Guantanamo Bay "cannot credibly claim any constitutional protections." Gov't Resp. at 1. That argument is inaccurate. In fact, Supreme Court precedent strongly suggests that aliens detained at Guantanamo *do* have constitutional rights. And in any event, it is emphatically *not* the case, as the Government suggests, that there is settled law on this issue—indeed, the Supreme Court is currently considering a case that will likely decide that very question. *See* 127 S. Ct. 3078 (2007) (granting certiorari to review the D.C. Circuit's decision in *Boumediene v. Bush*, 476 F.3d 981 (2007)). Thus, this Commission should, at a minimum, stay proceedings until the Supreme Court reaches a decision in *Boumediene.*

c. Assuming this Commission reaches the merits of Mr. Khadr's equal protection claim, it must subject the MCA to strict scrutiny for two reasons: aliens are a suspect class; and the MCA's limitations burden the fundamental right of access to the courts. But even if a lower level of scrutiny were appropriate (as the Government claims), the MCA is unconstitutional because the Government has failed to provide a single legitimate government interest to support subjecting aliens—and only aliens—to trial by military commission. An examination of the MCA's legislative history reveals why the Government cannot identify any such interest: the MCA's classifications are a result of anti-alien animus and a desire to reassure American voters that their fellow citizens would not be subject to trial by military commission. But neither animus toward a suspect class nor a desire to exempt citizens from a burden imposed on a disenfranchised minority is a legitimate government interest sufficient to survive even rational basis review.

d. Accordingly, the MCA violates the equal protection guarantee of the Fifth Amendment, and the charges against Mr. Khadr should be dismissed.

4. **Reply:**

A. THE CONSTITUTION'S PROMISE OF EQUAL PROTECTION APPLIES TO MR. KHADR.

(1) As Mr. Khadr's motion discussed at length, the proposition that all persons are entitled to the equal protection of the laws is a core tenet of the U.S. Constitution. *See* Def. Motion at 1-2.[2] In an effort to deny Mr. Khadr this protection, the Government argues that the United States Supreme Court has "squarely held" that aliens in Mr. Khadr's position—those outside the sovereign borders of the United States and with no voluntary connection to the country—do not possess rights under the Constitution. Gov't Resp. at 1, 7. That is simply wrong. The Supreme Court has in fact held that with some exceptions not relevant here (naturalization and the provision of government benefits) citizens and non-citizens in similar circumstances "should be treated alike." *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

[2] Unsurprisingly, international law also recognizes the importance of applying the law in a fair and even-handed manner. Thus, as discussed in Mr. Khadr's motion, numerous major treaties to which the United States is a signatory recognize this fundamental principle. *See* Def. Motion at 10-11 (discussing the International Covenant on Civil and Political Rights and the Geneva Conventions).

(2) More specifically, the Government claims that aliens detained at Guantanamo Bay are not entitled to the Constitution's protections because (i) Guantanamo lies outside U.S. borders and within Cuban borders, and (ii) Guatanamo detainees lack a "voluntary connection" to the United States. The first proposition ignores recent Supreme Court precedent, and the latter proposition is irrelevant to an Equal Protection analysis.

a. The Constitution's Equal Protection Guarantee Applies at Guantanamo Bay.

(i) The Government first argues that the Constitution does not apply in Guantanamo Bay. In support of this argument, it relies chiefly on *Johnson v. Eisentrager*, 339 U.S. 763 (1950). But as Mr. Khadr explained in his initial motion, *Eisentrager* held only that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction." *Id.* at 771. It thus said *nothing* about the question at hand; namely, whether Guantanamo Bay is "within [the courts'] territorial jurisdiction."[3]

(ii) Attempting to evade this difficulty, the Government claims that Guantanamo is obviously outside the territorial jurisdiction of United States courts because it is located in a foreign country. In fact, however, that conclusion is far from obvious—indeed, the available Supreme Court precedent strongly suggests that it is incorrect. Four years ago, in *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that because the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, aliens detained there fall *within* the territorial jurisdiction of U.S. courts for purposes of the federal habeas statute. *Id.* at 480. In its brief, the Government attempts to brush aside this holding by claiming that *Rasul* was "clearly limited to whether Congress intended a federal statute to cover aliens held at a place such as Guantanamo." Gov't Resp. at 6. That is a distortion of the Court's opinion. To be sure, the *Rasul* Court was construing a statute and not a provision of the Constitution. But the Court nowhere expressly limited its holding to the habeas statute. To the contrary, the Court used broad language and emphasized the unique historic and practical connection between the United States and Guantanamo Bay. *Rasul*, 542 U.S. at 480; *see also id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.") (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-778 (1950)). The *Rasul* decision gave no indication that the territorial jurisdiction of U.S. courts should reach Guantanamo Bay for habeas petitions, but not for constitutional challenges; and the logic of its analysis applies to both cases. Because of the United States's "indefinite lease of Guantanamo Bay," *id.*, and due to the fact that "from a practical perspective," the Naval Base "belongs to the United States," *id.*, there is every reason to believe the Constitution extends to aliens detained there.[4] The Government's reading

[3] The Government also argues—again invoking *Eisentrager*—that the Constitution's equal protection guarantee cannot protect Mr. Khadr, because if he were eligible for equal protection he would somehow have a more privileged position than American service members. Gov't Resp. at 4. As its name indicates, however, equal protection requires no such thing. As discussed below, the Constitution requires only "that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *see also infra* at 5-6, 9-10.

[4] To hold otherwise would mean that the applicability of the Constitution would depend on nothing more than whether the Government decided to detain prisoners at Guantanamo Bay or at Fort Dix. There is no

of *Rasul* forces an unnecessary tension between that decision and *Eisentrager* and for that reason alone this Commission should reject it.

(iii) Even if the Government's reading of *Rasul* were correct, it is emphatically not "settled law," as the Government asserts. Gov't Resp. at 4. Indeed, the Government's interpretation of *Rasul* and *Eisentrager* is currently under review by the United States Supreme Court. As this Commission is aware, the Supreme Court granted certiorari on a petition for rehearing in *Boumediene,* a case where the D.C. Circuit adopted a cramped reading of *Rasul* similar to the one offered by the Government here. *See Boumediene v. Bush*, 476 F.3d 981 (holding that the Suspension Clause does not apply in Guantanamo), *cert granted* 127 S. Ct. 3078 (2007). The Supreme Court has heard oral argument, and the decision is pending. Given the uncertain status of *Boumediene* and the Supreme Court's impending decision, there is no basis for the Government's assertion that it is well-settled that aliens like Mr. Khadr who are held in Guantanamo have no rights under the Constitution.

(iv) If this Commission concludes that its decision on Mr. Khadr's motion will depend on either the continued validity of *Boumediene* or the soundness of the Government's argument that the Constitution does not apply at Guantanamo Bay, prudence requires staying these proceedings until the Supreme Court reaches a decision in *Boumediene* this spring. As Mr. Khadr pointed out in his initial motion, this is exactly the course followed by several D.C. district court judges who stayed habeas proceedings pending before them until the status of *Boumediene* is resolved. *See Maqaleh v. Gates,* No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct 5, 2007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct 2. 2007). The rationale for a stay has only grown stronger in the interim, as the Supreme Court's decision becomes more imminent.

b. The Constitution's Equal Protection Guarantee Protects Aliens Involuntarily Present in Guantanamo Bay.

(i) The Government also offers a second reason why the Constitution does not apply to Mr. Khadr. It claims that even if Guantanamo Bay falls within the territorial jurisdiction of the United States, Mr. Khadr lacks a sufficient connection to this country to invoke the Fifth Amendment because he did not go to Guantanamo *voluntarily*. Gov't Resp. at 5. While it may be true that Mr. Khadr did not go to Guantanamo voluntarily, that fact is completely irrelevant to Mr. Khadr's equal protection claim.

(ii) As an initial matter, Mr. Khadr has been detained by the United States in a naval base under the "complete jurisdiction and control" of the United States, *Rasul*, 542 U.S. at 480, for more than five years—a quarter of his lifetime. He certainly possesses significant "connections" to this country and its government.

(iii) More importantly, however, the Government's novel "voluntary connections" test has no place in an equal protection analysis. The Fifth and Fourteenth Amendments protect *all*

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support for the proposition that important Constitutional rights should depend upon where the Government decides to detain its prisoners.

aliens within the territorial jurisdiction of the United States, regardless of how they arrive. As the Supreme Court has unequivocally stated: "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Every one whose presence in this country is unlawful, ***involuntary***, or transitory is entitled to that constitutional protection." *Matthews v. Diaz*, 426 U.S. 67, 77 (1976) (internal citations omitted) (emphasis added); *Plyler v. Doe*, 457 U.S. 202, 210 (interpreting *Matthews* to prohibit discrimination against unlawful aliens).

(iv) The "voluntary connections" test offered by the Government comes from a case that analyzed a different part of the Constitution in completely different circumstances. In *Verdugo-Urquidez*, the Supreme Court held that a Mexican resident arrested in the United States and held there for "only a matter of days" could not invoke the Fourth Amendment to protect his property in Mexico from a search by U.S. agents. *Verdugo-Urquidez*, 494 U.S. 259, 271-72 (1990). That case is readily distinguishable from Mr. Khadr's in two important respects.

(v) First, the *Verdugo-Urquidez* Court emphasized the short amount of time the prisoner in that case was detained in the United States. In a critical sentence, which the Government notably omits from its discussion, the Court clarified that "the extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide." *Id.* Thus, the Court specifically exempted from its discussion the circumstances relevant to this case. Mr. Khadr has been detained on a United States Naval Base for five years and is being tried for war crimes by a United States military commission. This case is thus far different from an alien's claim that he was entitled to constitutional protection of property held in Mexico simply because he was detained in the United States for a matter of days.

(vi) Second, the *Verdugo-Urquidez* Court made clear at the outset of its opinion that there are important differences between the Fourth and Fifth Amendments, and that the protections of the Fifth Amendment were not before it: "Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case." *Id.* at 264. The Fourth Amendment, the Court explained, "extends its reach only 'to the people.'" *Id.* This language, like other amendments using the same words (the Second, the First, and the Ninth, for example) "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be part of that community." *Id.* at 265. But, as the Court continued, an analysis under this Amendment is entirely different from one under the Fifth Amendment, which uses the word "person" and has a broader application. *Id.* The Fifth Amendment states that "no person" can be deprived of due process of law, and the Supreme Court has clearly held that "an alien is surely a person in any ordinary sense of that term" and is thus entitled to the Amendment's protections. *Plyler*, 457 U.S. at 210.[5] Mr. Khadr is thus a

[5] The other case relied on by the Government to support this "voluntary connection" test is also distinguishable, and the language highlighted by the Government is non-binding dicta in any event. In *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004), two Saudi Arabian pilots challenged the promulgation of two aviation regulations, claiming they were passed without the proper accompanying procedures, denying them a meaningful opportunity to be heard. The case thus dealt with far different circumstances

"person" within the meaning of the Fifth Amendment and is entitled to equal protection of the law, regardless of whether he arrived here voluntarily or was brought here against his will.

B. THE MCA IS UNCONSTITUTIONAL BECAUSE THERE IS NO LEGITIMATE, LET ALONE COMPELLING, REASON TO APPLY THE STATUTE ONLY TO ALIENS.

(1) This Court Must Scrutinize the MCA's Discrimination Against Aliens To Ensure There is a Sufficiently Important Governmental Interest To Justify It.

(a) The Government concedes, as it must, that the MCA denies non-citizens, and only non-citizens, many of the basic protections provided in the federal court system and the UCMJ military commission system. Gov't Resp. at 9. Because the MCA was explicitly designed to deny fundamental trial rights to certain people based *solely* on their lack of citizenship, the MCA implicates the core purposes of the equal protection guarantee and is subject to strict judicial scrutiny.

(b) The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). While "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest," "[t]he general rule gives way . . . when a statute classifies by race, alienage, or national origin." *Id.* at 440. The Supreme Court has explained that alienage is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in [that] consideration[] are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.*; *see also Graham v. Richardson*, 403 U.S. 365, 372 (1971) (non-citizens are a "prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate").

(c) While the federal government may have greater latitude than the states to distinguish between citizens and non-citizens, that latitude has been limited to the context of immigration and the provision of federal benefits. *See* Neal K. Katyal & Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002). The deference shown to the federal government in these areas "has its roots in the wide berth accorded the political branches 'in the area of immigration and naturalization,' particularly when the withholding of such benefits as employment opportunities from aliens provides a possible bargaining chip in seeking reciprocal concessions in foreign trade and labor negotiations." *Id.* at

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than the serious criminal charges facing Mr. Khadr. The D.C. Circuit commented in dicta that in some instances non-resident aliens are not entitled to Constitutional protections, but it did not rule on the subject noting "we need not decide whether [the pilots] are entitled to constitutional protections because, even assuming they are, they have received all the process that they are due under the precedent." *Id.* at 1183.

1300-01.[6] But "[p]lainly, subjecting aliens who are unlawful enemy combatants to military tribunals while guaranteeing otherwise indistinguishable United States citizens civilian justice cannot be understood in immigration or international bargaining terms." *Id*. at 1300-01 (internal citation omitted).

(d) The prosecution has cited *no case* holding that the relaxed scrutiny applicable to federal alienage classifications in the contexts of immigration and federal benefits should be extended beyond those narrow categories. Instead, the government relies almost exclusively on immigration and federal benefits cases for the proposition that alienage classifications receive deferential scrutiny. But this is not an immigration or federal benefits case. As a result, this Commission must apply the general rule that legislation classifying individuals on the basis of alienage must be subjected to heightened scrutiny. *See, e.g.*, *Graham*, 403 U.S. at 372; *Toll v. Moreno*, 458 U.S. 1 (1982).[7] Significantly, examining the government's actions with greater scrutiny does not preclude the federal government from making such distinctions under all circumstances; it simply requires that there be a sufficiently compelling reason for it to do so. When the legislature discriminates against groups such as aliens that are unable to defend themselves through the political process, there is special reason for the courts to examine critically the necessity of that classification. As Justice Blackmun has explained, "the fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage." *Moreno*, 458 U.S. at 23 (Blackmun, J., concurring).

(e) The same critical examination is necessary when, as here, the legislature burdens a fundamental right, such as the right of access to the courts. The fact that the judicial access cases cited in Mr. Khadr's motion do not "relate[] to the access of aliens held as enemy combatants," Gov't Resp. at 13, is hardly surprising, given that the Government's conduct pursuant to the MCA is nearly unprecedented in our nation's history. The novelty of the Equal Protection violation here does not shield it from review, nor does it change the fundamental proposition for which the cases cited in Mr. Khadr's motion stand: governmental action that burdens a fundamental right, such as access to the courts, must be subject to strict judicial scrutiny. *See* Katyal & Tribe, *supra*, at 1301 ("[T]he decisions manifesting relaxed rather than heightened scrutiny of federal discriminations that categorically favor United States citizens have involved nothing beyond the preferential availability to our own citizens of government employment or other socioeconomic benefits that do not touch the raw nerve of equal justice

[6] It is thus unsurprising that, as the prosecution points out, *Rodriguez-Silva v. INS*, 242 F.3d 243 (5th Cir. 2001), applied rational basis review. *See* Gov't Resp. at 11 n.7. *Rodriguez-Silva* addressed only "Congress's authority to set admission and naturalization criteria that are place of origin or nationality-sensitive." 242 F.3d at 248.

[7] Further, there is no reason why Khadr is any less entitled to equal protection than any "lawful, resident" alien. *See* Gov't Resp. at 9. Whether or not Khadr is an unlawful combatant, his presence in U.S. territory is most certainly lawful: he is detained at the behest and under the care of the federal government, and he has been resident at Guantanamo for a quarter of his life.

under law—benefits whose distribution on an unequal basis accordingly does not trigger strict scrutiny.").[8]

(f) In any event, the precise level of scrutiny that attaches to the MCA's classification is irrelevant to the result in this case. Even under the least demanding standard—rational basis review—legislation must be rationally related to a legitimate government interest. *See City of Cleburne*, 473 U.S. at 446; *see also id.* (recognizing that application of rational basis review does not leave the relevant group "unprotected from invidious discrimination"). The Supreme Court has explained that under rational basis review government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* Nor may it discriminate between two groups solely to "harm a politically unpopular group." *Id.* at 446-47 (internal quotation marks omitted). The MCA fails both these tests.

(2) The MCA Fails Under Any Level of Judicial Scrutiny Because There Is No Legitimate Government Interest to Support Its Distinction Between Aliens and Citizens.

(a) While the Government half-heartedly argues that the MCA's procedures are "fair," *id.* at 13, that argument is both wrong and irrelevant. As discussed in Mr. Khadr's motion, the MCA denies aliens many important protections, and it is for that reason that the legislators who enacted the MCA made clear that they did not want its procedures to be applied to American citizens. *See* Def. Motion at 8-9; *see also* 152 Cong. Rec. S10244-45 (daily ed. Sept. 27, 2006) (statement of Sen. Levin) ("military tribunals would be free to admit, for the first time in U.S. legal history, statements that were extracted through abusive practices" and "the changes that appear in the bill which is now before us, taken together, will put our own troops at risk if other countries decide to apply similar standards to our troops if they are captured and detained"). But more significantly, the Government's argument is irrelevant to Mr. Khadr's equal protection challenge. Equal protection does not require that any minimum level of procedural safeguards be provided to those who are charged with committing war crimes; it instead requires only that whatever procedures are provided be provided equally.

(b) The Government argues that it has a "legitimate obligation to punish those who are at war with the United States and its allies who commit violations of the laws of war and other offenses triable by military commission." Gov't Resp. at 9. Mr. Khadr does not disagree with this proposition. But it speaks only to the need to distinguish between those who have allegedly violated the law of war and those who have not, and says nothing about why it would be necessary, or even helpful, to distinguish between those who are citizens and those who are not. Indeed, if military commissions are necessary to try those who commit violations of the law of war, it makes little sense to distinguish between those who are citizens and those who are not, because both groups have proven themselves equally capable of committing such violations.

[8] *Ludecke v. Watkins*, 335 U.S. 160 (1948), is not to the contrary. It merely stands for the unremarkable proposition, discussed *supra*, that the federal government has considerable discretion in the immigration context. *See* 335 U.S. at 164 (noting the "President's power to order the removal of all enemy aliens").

(c) Since the attacks of September 11th, this country has been engaged in what the Executive has termed a "war on terror." *See* Speech of President George W. Bush (Sept. 20, 2001). It is not a war on any specific foreign country, but rather against a "collection of loosely affiliated terrorist organizations." *See id.* The members of these terrorist organizations are scattered throughout the world, *see id.* ("There are thousands of these terrorists in more than 60 countries."), living interspersed with individuals who have never supported terrorism of any kind. As President Bush has explained, these terrorists "are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction." *See id.*

(d) This "war on terror" is fundamentally different from wars this country has fought in the past. *See, e.g.*, 152 Cong. Rec. S10243 (daily ed. Sept. 27, 2006) (statement of Sen. Frist) ("It is a war unlike any we have ever before fought. It is an ideological war against radicals and zealots. We are fighting a different kind of enemy."). According to the prosecution, "[a]cts of war . . . by definition have a foreign source," and it is therefore necessary to "use force to prevent the enemy, whether a foreign state or a terrorist organization, from harming American lives and property." Gov't Resp. at 12, 11. But, as explained by the Executive, the "war on terror" is not a war against some readily identifiable foreign nation; rather, it is a war against terrorists of all nationalities, including Americans. The fact that Americans such as Yasser Hamdi, an American citizen born in Louisiana, and Jose Padilla, an American citizen born in New York, have been designated enemy combatants is testament to the fact that this global "war on terror" is not a war only against foreigners. As former Attorney General Alberto Gonzales recently emphasized, "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so."[9] In this context, it is ***not*** "necessary for the Government to make distinctions between aliens and citizens by the very act of defending our Nation from its enemies." Gov't Resp. at 12. To the contrary, making such distinctions may actually hinder the United States's efforts in the war on terror. It is perhaps for this reason that the Bush Administration initially considered proposing legislation which would have made all enemy combatants, aliens and citizens alike, triable by military commission. *See* Enemy Combatants Military Commission Act of 2006 (attached to Def. Motion as Exhibit A). It is doubtful that the Executive would have even considered such legislation if it believed it necessary to draw some distinction between aliens and citizens for purposes of trying enemy combatants.

(e) Further, it is well-established that a central purpose of the Constitution's equal protection guarantee is to prevent the Government from distinguishing between individuals solely on the basis of some animus or dislike of a particular group. Thus, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental

[9] Perhaps recognizing the weakness of its position, the Government immediately hedges by saying that the "Global War on Terror" is "*primarily* foreign in nature," and in the next sentence that "the threat is *ultimately* a foreign threat." Gov't Resp. at 12. The Government cannot whitewash the reality and pretend that the "Global War on Terror" does not involve threats from diverse sources, including American citizens. If the threats of the War on Terror come from both citizens and non-citizens—and as Attorney General Gonzales has made clear, they do—then the Constitution requires that citizens and non-citizens be treated equally.

interest." *Dep't of Agric. v. Moreno*, 413 .S. 528, 534 (1973); *see also Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (affirming the principle articulated in *Moreno*).

(f) The legislative history of the MCA makes clear that Congress decided to treat aliens differently than citizens solely because certain legislators believed that such treatment was what alien suspects "deserve[d]." *See* 152 Cong. Rec. S10395 (daily ed. Sept. 28, 2006) (Sen. John Cornyn) ("I happen to believe these individuals, who are high-value detainees at Guantanamo Bay, do not deserve the same panoply of rights preserved for American citizens in our legal system."). Further, legislators sought to assure voters that they and their fellow citizens—unlike non-citizens—would not be subject to trial by military commission. *See, e.g.*, 152 Cong. Rec. S10,250 (daily ed. Sept. 27, 2006) (statement of Sen. Warner) ("It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens—aliens, not U.S. citizens—bomb-makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are—again, only aliens . . . ."); *id.* at S10,267 (statement of Sen. Kyl) ("This legislation has nothing to do with citizens."); *id.* at H7544 (statement of Rep. Buyer) ("It will not apply to United States citizens."); *id.* at S10,251 (statement of Sen. Graham) ("Under no circumstance can an American citizen be tried in a military commission."). The Government has not provided a single citation to the legislative history of the MCA that suggests that its distinction between aliens and citizens was rationally related to a legitimate Government purpose. Indeed, it has not provided a single citation to suggest that it was anything other than a concession to those who sought retribution against aliens. But "[w]hen defenders of the line being drawn can, in truth, invoke little beyond the obvious political convenience of stilling the voices that might otherwise rise up in protest were American citizens exposed to this distinctly inferior brand of justice along with their alien counterparts, due process of law demands more evenhanded treatment by the government." Katyal & Tribe, *supra*, at 1303.

(g) As discussed above and in Mr. Khadr's motion, the fact that equal protection principles require that citizens and non-citizens be tried in the same tribunals says nothing about the composition of those tribunals. The Government's argument that recognizing Mr. Khadr's entitlement to equal protection of the law would somehow suggest "that Congress many not authorize enemy combatants to be tried by military commissions at all," Gov't Resp. at 14, simply ignores the fact that Mr. Khadr's motion explicitly recognized that "[t]he Equal Protection Clause . . . does not require that military commissions be eliminated, only that they be evenly applied." Def. Motion at 10. The Government's effort to raise this red herring reveals the weakness of its argument on the merits of Mr. Khadr's equal protection challenge: the MCA's distinction between citizens and non-citizens was not rationally related to any legitimate government interest, but was instead motivated by animus toward aliens.

C. CONCLUSION

(1) The right to equal protection under law is a fundamental part of both U.S. and international law. The MCA violates this principle by classifying persons accused of alleged war crimes based on their citizenship, and subjecting aliens—and only aliens—to trial by military commissions. The Government has offered no legitimate, let alone compelling, explanation for why it is necessary to subject aliens to trial by these special tribunals, but not for U.S. citizens

charged with similar (or even more dangerous) crimes. The constitutional guarantee of equal protection does not require Congress to establish any minimum substantive or procedural rights for the trials of those charged with war crimes. But it does require that, in the absence of some compelling justification, the rights and rules Congress establishes be applied equally to all similarly charged defendants, regardless of their citizenship. The MCA was explicitly designed to contravene this principle, and thus violates the Constitution's guarantee of equal protection.

By: _____

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** **For Appropriate Relief** (to Preclude Further Ex Parte Proceedings Under Color of M.C.R.E. 505(e)(3)) 11 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905 and the Military Judge's 5 December e-mail order.

2. **Relief requested:** The defense respectfully requests the Military Judge to issue an order declaring M.C.R.E. 505(e)(3) to be inconsistent with the provisions of the Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (MCA), to the extent M.C.R.E. 505(e)(3) purports to authorize the government to resolve a claim of privilege relating to classified information through *ex parte* proceedings.

3. **Overview:**

a. With exceptions not applicable here, MCA § 949d(b) unambiguously provides the accused with the right to be present at all proceedings of a military commission. MCA § 949d(f)(2)(C) carves out an exceedingly narrow exception to this statutory right, in very limited circumstances, for the protection of classified information: the military judge *may* permit *ex parte* contact in limited circumstances following an objection by trial counsel "during the examination of any witness" at trial. Consistent with the accused's right to be present, the MCA otherwise allows the government to resolve claims of privilege relating to classified information *in camera*, not *ex parte*.[1] Notwithstanding the unambiguous statutory requirement that the accused be present during all proceedings, the Secretary of Defense promulgated M.C.R.E. 505(e)(3), which purports to authorize the government to resolve a claim of privilege relating to classified information in connection with discovery through an *ex parte* proceeding. The prosecution relied on this *ultra vires* provision to provide the Military Judge with materials relating to this case (and presumably otherwise within the scope of the government's discovery obligation) on 6 December 2007. The result was a proceeding of this Commission from which the accused and his counsel were excluded, over defense objection, in contravention of MCA § 949d(b).

4. **Burdens of proof and persuasion:** This motion principally presents a question of law. As the moving party, the burden of persuasion is on the defense.

[1] MCA § 949d(f)(3).

5. **Facts:**

a. Congress enacted, and the President signed into law, the MCA on 17 October 2006. The Secretary of Defense issued the Manual for Military Commissions on or about 18 January 2007.[2]

b. Charges were initially sworn against Mr. Khadr on 2 February 2007 and referred for trial by this Military Commission on 24 April 2007. Following dismissal of those charges, government appeal, and remand, Mr. Khadr was arraigned on 8 November 2007.

c. On or about 1 December 2007, without notification to the defense Major Jeffrey Groharing (trial counsel) invoked M.C.R.E. 505(e)(3), seeking to provide the Military Judge with classified matters *ex parte* in connection with discovery. The prosecution claimed that the matters were classified at the "secret/SCI" level.[3]

d. Upon notification of the government's request, the defense objected to the proposed procedure via e-mail on the grounds that M.C.R.E. 505(e)(3) conflicts with MCA § 949d(b) and requested the Military Judge to refrain from acting on the prosecution request before the opportunity for full briefing and argument on the issue.[4]

e. On 5 December 2007, the Military Judge issued an e-mail order finding that the provisions of M.C.R.E. are not "facially invalid," and indicating his intention to conduct the requested review. The order additionally directed the defense to file the instant motion on or before 11 January 2008.[5]

f. On 6 December 2007, the Military Judge reviewed matters submitted by the prosecution *ex parte* at Guantanamo Bay, Cuba. The Military Judge declined to issue an order under the provisions of M.C.R.E. 505(e).[6]

g. LCDR Kuebler, Mr. Khadr's detailed defense counsel, possesses a permanent "secret" clearance and an interim "top secret" clearance.[7]

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[2] *See* Manual for Military Commissions, Executive Summary, of 18 January 2007.

[3] [redacted]

6. **Law and argument:**

a. The Accused And Defense Counsel Have An Unambiguous Right To Be Present At All Proceedings Of A Military Commission

(1) There can be little serious dispute that the right to be tried in one's presence lies at the very heart of Anglo-American notions of a fair trial.[8] It has long been recognized in court-martial proceedings under the Uniform Code of Military Justice (UCMJ)[9] (on which the MCA is "based")[10] as well.[11] While consciously choosing to omit many trial rights traditionally associated with criminal prosecution in the United States,[12] in enacting the MCA, Congress specifically elected to preserve this right: MCA § 949a(b)(B) provides that the "accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title. MCA § 949d(b), in turn, reiterates the right of the accused to be present with limited exceptions inapposite here:

> Except as provided in subsections (c) and (e), *all proceedings* of a military commission, including any consultation of the members with the military judge or counsel, shall—
>
> (1) be in the presence of the accused, defense counsel, and trial counsel; and
>
> (2) be made part of the record.

(2) Subsections (c) and (e) establish two narrow exceptions to the general rule that the accused has the right to be present: Subsection (c) provides that "[w]hen the members of a military commission . . . deliberate or vote, only the members may be present."[13] Subsection (e) provides that the accused may be excluded if, after warning by the military judge, "the accused persists in conduct that justifies exclusion from the courtroom—(1) to ensure the physical safety of individuals; or (2) to prevent disruption of the proceedings by the accused."[14] Neither exception applies here.

(3) Likewise, there can be little argument that provision of evidence by the prosecution to the military judge for review in connection with discharge of the government's

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[8] *See Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *see also Lewis v. United States*, 146 U.S. 370 (1892).

[9] 10 U.S.C.S. §§ 801 *et seq* (2007).

[10] MCA § 948b(c).

[11] 10 U.S.C.S. § 839(b) (2007) (accused must be present for all proceedings except "[w]hen the members of a court-martial deliberate or vote").

[12] *See, e.g.*, MCA § 948b(d) (listing UCMJ provisions not applicable in trials by military commission).

[13] MCA § 949d(c).

[14] MCA § 949d(e).

discovery obligations constitutes a "proceeding" of the military commission. Black's Law Dictionary defines "proceeding" to include "the form and manner of conducting juridical business before a court or judicial officer. . . . including *all possible steps* in an action from its commencement to the execution of its judgment."[15] Moreover, the language of MCA § 948d(b) mirrors the language of Article 39(b) of the UCMJ. That provision of the UCMJ has long been interpreted as prohibiting *ex parte* communications involving the military judge or the conducting of business by a court-martial otherwise outside the presence of the accused and counsel. *See United States v. Priest*, 42 C.M.R. 48 (C.M.A. 1970); *United States v. Chavira*, 25 M.J. 705 (A.C.M.R. 1987); *United States v. Dean*, 13 M.J. 676 (A.F.C.M.R. 1982). Thus, the 6 December 2007 *ex parte* review was clearly a proceeding of the military commission from which the accused and his counsel were excluded. Any other conclusion would defy the plain and unambiguous meaning of the word "proceeding," as well as common sense.

b. Provisions Of The MCA Dealing With Classified Information Do Not Provide The Secretary Of Defense With Authority To Issue A Rule Of Evidence Or Procedure In Contravention Of The Accused's Statutory Right To Be Present At All Proceedings Of The Military Commission

(1) The statute could not be clearer: *all proceedings* of a military commission must be conducted in the presence of the accused and counsel, except under the two narrow exceptions provided in MCA § 949d. Notwithstanding this clear statutory language, the Secretary of Defense prescribed (and the prosecution has invoked) M.C.R.E. 505(e)(3). This rule purports to authorize the prosecution to submit matters to the military judge "*in camera* and *ex parte*" in the course of complying with its discovery obligations in military commissions. To the extent this provision contemplates a proceeding of the commission from which the accused and counsel are excluded, it is plainly inconsistent with MCA §§ 949a(b)(B) and 949d(b) and therefore invalid.

(2) The Secretary of Defense has no authority to promulgate a rule of evidence or procedure that is inconsistent with the MCA. While MCA § 949a(a) does give the Secretary the authority to prescribe rules of evidence and procedure for military commissions under the MCA, such rules may not be "contrary to or inconsistent with" the MCA itself. Nothing in the statute gives the Secretary the authority to contravene Congress' clear statement that all proceedings of a military commission be conducted in the presence of accused and counsel.[16]

(3) Examination of the provisions of the MCA dealing with protection and discovery of classified information do not compel a contrary result. MCA § 949d(f) establishes a "national security privilege," which governs the use and disclosure of classified information in military commission proceedings. MCA § 949d(f)(3) provides that a "claim of privilege under this

[15] *Black's Law Dictionary* 1204 (6th ed. 1990) (emphasis added).

[16] The government has acknowledged that the Secretary may not prescribe rules of procedure inconsistent with the MCA or the Constitution. (*See* Pros. Resp. to Def. Req. for Abeyance of Proceedings of 12 Oct 07.) Moreover, this Military Commission has already once rejected government efforts to rely on Secretarial gloss of the MCA to overcome an unambiguous statutory requirement. (*See* Disposition of Pros. Mot. for Reconsideration of 29 Jun 07.)

subsection and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused." Subsection (f)(3) does not state or suggest that the accused or counsel may be excluded from an in camera proceeding for such purposes, merely that "materials submitted in support thereof . . . shall not be *disclosed to the accused*." (Emphasis added). Moreover, subsection (f)(3) says nothing that requires materials submitted by the government to be withheld from *counsel* for the accused.[17]

(4) The one provision of the MCA that does allow for "*ex parte*" contact under very limited circumstances simply provides no authority for M.C.R.E. 505(e)(3). MCA § 949d(f)(2)(C), which governs assertion of the national security privilege "*at trial*," states:

> During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an ex parte basis . . . .

Thus, the MCA contemplates one, very narrow set of circumstances (i.e., after a particular objection at trial during cross-examination of a witness) under which an *ex parte* contact *may* be authorized. It in no way provides authority for the Secretary to issue a rule requiring the military judge to allow the government to circumvent the accused's right to be present at all stages of the proceedings through a claim of privilege in the discovery phase of a military commission case.

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[17] Strictly speaking, the question of disclosure to defense counsel (as opposed to the presence of accused and counsel at the *in camera* review), presents a distinct issue. However, any information the government would seek to disclose to the military judge *ex parte* would necessarily appear to be within the scope of the government's discovery obligations under R.M.C. 701, otherwise there would be no need to invoke the M.C.R.E. 505(e)(3) procedure. Therefore, the government is clearly required to disclose the information to defense counsel. To the extent the government takes the position that matters not disclosed to the accused should not be disclosed to counsel, this would be exceedingly odd. The government has served 172 classified documents on defense counsel in discovery in this case, subject not only to federal statutes and regulations prohibiting disclosure to the accused, but subject to a protective order issued by the military judge as well, which prohibits disclosure to the accused. In addition, defense counsel are subject to protective orders requiring them to keep the names of witnesses from their client. (*See* Protective Orders Nos. 002-003.) Indeed, the government went so far as to serve two sets of unclassified discovery on the defense – one for counsel and one for the accused. Moreover, the MCA itself appears to contemplate defense counsel having access to information not necessarily provided to the accused. If the accused elects to be represented, he must be represented either by military counsel or, under MCA § 949c(b)(3), civilian defense counsel who is a U.S. citizen with a security clearance. MCA § 949c(b)(4) specifies civilian counsel's obligation to refrain from disclosing classified information to "any person not authorized to receive it[,]" including, presumably, the accused. Clearly, the government expects defense counsel to see and possess a considerable amount of information not disclosed to the accused. But seemingly, in the government's view, the *prosecution* gets to decide which classified matters *admittedly within the scope of its discovery obligation* will be provided to defense counsel and which matters will not. Congress could not have intended and indeed did not provide for such an anomalous result.

(5) The provision of the MCA specifically dealing with disclosure of classified information in discovery, and therefore most relevant to any evaluation of M.C.R.E. 505(e)(3), is MCA § 949j(c). That subsection provides that the military judge, "upon motion" of the trial counsel, shall authorize, "to the extent practicable," various alternatives to full disclosure (e.g., production of a substitution for or summary of classified information). While trial counsel's "motion" under this provision may, presumably, be resolved through a claim of privilege reviewed *in camera*, nothing in MCA § 949j(c) allows for such a claim of privilege, in the course of discovery, to be resolved on an *ex parte* basis or would allow the Secretary to issue a rule providing for such. Indeed, under the principle *expressio unius est exclusio alterius*, Congress' omission of any provision allowing for an *ex parte* contact in the course of discovery when it expressly allowed for such contacts (under limited circumstances) at trial, creates a strong negative inference that Congress intended to preclude use of such a procedure.[18]

(6) This conclusion is strengthened by examination of M.R.E. 505, governing use and disclosure of classified information in courts-martial. M.R.E. 505(g)(2), like MCA § 949j(c), provides for employment of alternatives to disclosure of classified information in connection with discovery. That subsection states that a government motion and materials in support thereof may "be considered by the military judge *in camera* and shall not be disclosed to the accused." M.R.E. 505(i)(1), in turn, defines an "*in camera* proceeding [as] a session under Article 39(a) from which *the public* is excluded. (emphasis added)." As the MCA is intended to establish a trial process "based upon" the practice and procedures of courts-martial, Congress' use of language mirroring the existing procedures in courts-martial creates a strong inference that it intended the same procedures to apply in military commissions, except where, as it did in MCA § 949d(f)(2)(C), Congress authorized a different procedure. It is clear that Congress considered and ordained employment of the same procedure for resolving claims of privilege as employed in courts-martial, i.e., an *in camera*, not an *ex parte* proceeding, which, in the government's view, would exclude the accused and counsel.[19]

(7) Finally, this conclusion is compelled by express Congressional intent to comply with U.S. obligations under Common Article 3 of the 1949 Geneva Conventions.[20] In *Hamdan*

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[18] *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

[19] M.C.R.E. 505(b)(3) states that an "*in camera* presentation" is not a "proceeding" of the military commission. The rule goes on to state that the accused may therefore be excluded at the request of the trial counsel. The attempt to torture language in this manner should be given no effect. As noted above, the relevant rule applicable in trials by court-martial, on which military commissions are based, defines an "*in camera*" proceeding as one from which the *public* is excluded. This is consistent with the ordinary and accepted meaning of the phrase "*in camera*," which entails a "judicial proceeding . . . had before the judge in his private chambers or when all *spectators* are excluded from the courtroom." *Black's Law Dictionary* 760 (6th ed. 1990) (emphasis added). For purposes of this motion, however, the Military Commission need not decide on the validity of M.C.R.E. 505(b)(3)'s creative "definition" of the term *in camera*; at most, it would allow a proceeding from which the *accused* could be excluded, not an *ex parte* proceeding such as that conducted on 6 December 2007.

[20] *See* MCA § 948b(f).

v. Rumsfeld,[21] a majority of the Supreme Court defined a "regularly constituted court" for purposes of Common Article 3 as one "established and organized in accordance with the laws and procedures already in force in a country."[22] Thus, the Supreme Court concluded that Mr. Hamdan was entitled under Common Article 3 to be tried by a tribunal employing the rules and procedures applicable in trial by courts-martial absent some "practical need" justifying deviation from court-martial practice. Here, Congress evidently considered, and rejected, the notion that there existed any "practical need" justifying a departure from court-martial practice under M.R.E. 505 as it relates to discovery. To the extent M.C.R.E. 505(e)(3) purports to authorize a procedure to the contrary, it simply violates the otherwise applicable requirement of MCA § 949d(b) (allowing the accused to be present) and is therefore invalid.

(8) The point is much more than academic. *Ex parte* proceedings, such as those contemplated here, undermine the effective operation of an adversarial justice system and the integrity of the truth-seeking process. Unable to examine classified information, defense counsel cannot dispute a claim that disclosure would undermine national security.[23] The government routinely overclassifies information or seeks to classify information available through open sources.[24] The military judge cannot be reasonably expected to invest the time and energy to develop the case that disclosure of a particular piece of classified information would not be "detrimental to the national security" – that is presumably the job of defense counsel. Nor can defense counsel dispute the practicability of proffered alternatives to full disclosure classified information or advocate for particular alternatives. Without doubting the good faith of the military judge or trial counsel, they simply cannot know the defense case, theories the defense may pursue, or how particular items of evidence may fit in with these theories or with evidence defense counsel have gathered from their client or through their own investigation. The result is a retardation of the truth-seeking process, and one completely unjustified by any countervailing governmental interest. It is simply impossible to see how disclosure of classified information to a military officer or other qualified counsel with appropriate security clearance would ever undermine national security. In such circumstances, the government's invocation of such a procedure can only serve to seriously undermine public confidence in the legitimacy of military commissions under the MCA. This cannot be consistent with the intent of Congress.

(9) Nothing in these provisions of the MCA allows for the Secretary to prescribe rules allowing *ex parte* proceedings in contravention of the clear statutory requirement that the accused and counsel be present at all proceedings. The Military Judge should issue an order to this effect, which will preclude future attempts to rely on this provision to violate Mr. Khadr's statutory rights in this proceeding.

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[21] 126 S.Ct. 2740 (2006).

[22] *Id.* at 2797.

[23] *Cf.* MCA § 949d(f)(1) (classified information is protected from disclosure only if "disclosure would be detrimental to national security.").

[24] *See The 9/11 Commission Report*, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 417 (2004); *see also* Briefing Memo. Of Lawrence J. Halloran of 24 Feb 05 (Attachment F).

c. Conclusion:

(1) The MCA allows the government to protect classified information. The relevant section of the MCA allows the government to resolve claims of privilege *in camera*, subject to the general statutory right of the accused and counsel to be present at all stages of the proceedings. While classified information need not necessarily be shown to the accused in such a proceeding, nothing in the MCA suggests that classified information that is clearly material to the preparation of the defense be withheld from defense counsel with the requisite security clearance. To the extent M.C.R.E. 505(e)(3) purports to authorize *ex parte* proceedings to resolve claims of privilege in the course of discovery, it is inconsistent with the MCA and therefore invalid.

7. **Oral Argument**: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for a thorough consideration of the issues.

8. **Witnesses and evidence:** Attachments A through F.

9. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. **Attachments:**

A. MAJ Groharing e-mail of 1 Dec 07

B. LCDR Kuebler e-mail of 4 Dec 07

C. LTC Chappell e-mail of 5 Dec 07

D. LTC Chappell e-mail of 6 Dec 07

E. Chris M. Winch Memo of 27 Aug 07

F. Briefing Memo. Of Lawrence J. Halloran of 24 Feb 05

By: _____

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	D 15 GOVERNMENT'S RESPONSE To the Defense's Motion to Preclude Further Ex Parte Proceedings **January 18, 2008**

1. **Timeliness:** This motion is filed within the time lines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. **Relief Requested:** The Government respectfully submits that the Defense's motion to preclude further *ex parte* proceedings should be denied.

3. **Overview:** The Defense maintains that Military Commission Rule of Evidence ("M.C.R.E.") 505(e)(3) conflicts with section 949d(b) of the Military Commissions Act of 2006 ("MCA"), insofar as the former authorizes the Government to move the Military Judge to determine *in camera* and *ex parte* whether classified information is subject to discovery. The construction of section 949d propounded by the Defense is squarely at odds with not only the text of the MCA, but also one of its primary objectives; namely, the protection of classified information during military commission proceedings. Indeed, the Defense's construction would make the MCA *less* protective of classified information than the rules applicable to courts-martial and federal courts, notwithstanding Congress's repeated insistence that commissions were necessary specifically to ensure that classified evidence is not shared with the enemy during wartime. It is clear from a full reading of the statutory text that Congress intended that certain matters involving classified materials would be handled in a setting from which the accused and Defense counsel would be excluded. Such circumstances were not considered by Congress to be "proceedings" of a military commission which required the presence of the accused. In addition, Congress specifically provided that the Secretary of Defense may prescribe additional procedures for the protection of classified information, and the procedures in M.C.R.E. 505(e)(3) are reasonable protections, consistent with the statute. Accordingly, the motion should be denied.

4. **Burden and Persuasion:** This motion presents a pure question of law. As the Defense is the moving party, it has the burden of persuasion. See R.C.M.905(c)(2)(B).

5. Facts:

a. Charges were sworn against the accused on 2 February 2007, and referred to trial by this military commission on 24 April 2007. Following dismissal of the charges by the Military Judge, appeal and remand, Khadr war arraigned on 8 November 2007.

b. On or about 1 December 2007, the trial counsel, invoking M.C.R.E. 505(e)(3), sought to provide classified information to the Military Judge for *ex parte, in camera* review in connection with its discovery obligations.

c. After the Military Judge informed counsel for the accused of the Government's submission, counsel objected to the procedure on the ground that it conflicted with Section 949d(b) of the MCA and requested the military judge to refrain from taking further action on the request pending briefing and argument on the issue.

d. On 5 December, 2007, the Military Judge issued an order asserting that the provisions of M.C.R.E. 505(e)(3) are not facially invalid. He instructed the Government to transfer the material at issue to the court for *ex parte* review with "no words exchanged." Def. Mot. Att. C. The Military Judge, however, authorized the Defense to submit a brief addressing the question whether M.C.R.E. 505(e)(3) was a permissible exercise of the Secretary of Defense's authority to implement the MCA. Id at 3.

e. On 6 December 2007, the Military Judge conducted an *ex parte* review of the classified material submitted by the Government, but did not issue an order addressing the Government's submissions.

6. Discussion:

a. The MCA Provides Unprecedented Protections For Classified Information.

(1) At the outset, one point should be abundantly clear: The MCA contains and authorizes unprecedented protections for classified information, far and above those provided in, for example, the Uniform Code of Military Justice ("UCMJ") or the Classified Information Procedures Act ("CIPA"). And the rationale for the MCA's expansive protections was obvious to its framers: Rather than authorizing the prosecution of our Nation's own soldiers or common criminals, the MCA authorizes the prosecution of our Nation's enemies in the midst of an ongoing armed conflict, men whose stated purpose on the planet is to terrorize and destroy the United States. Given those high stakes, Congress made plain—in the MCA's statutory text, structure, and its legislative history—that extraordinary measures were necessary to protect classified information at all stages of the military commissions process.

(2) Thus, the text of the MCA draws a sharp distinction between military commissions and other tribunals. For example, section 948b, which contains general principles and procedures governing the military commissions, provides that "the Uniform Code of Military Justice . . . does not, by its terms, apply to trial by military commission

except as specifically provided in this chapter," and that "judicial construction and application" of the UCMJ are "not binding on military commissions established under this chapter." 10 U.S.C. § 948b(c). Section 948b(d) goes on to make explicit a number of consequences of subsection (c)'s broad default rule, listing several specific UCMJ sections-including the broad discovery rule in Article 32—that "shall not apply to trial by military commission." Id § 948b(d). Moreover, the MCA includes new sections—such as section 949d(f)—which have no analogue under federal law, and which authorize the Secretary of Defense to issue rules for the protection of classified information at "all stages of the proceedings." Id. § 949d(f)(1)(A), (4). Congress even enacted a specific provision—again, with no analogue under federal law—to protect the disclosure of intelligence "sources, methods, or activities" during the discovery process. See id § 949j(c)(2). These provisions make clear Congress's intent to provide unprecedented protections for classified information. SeeNixon v. United States, 506 U.S. 224, 232 (1993) ("[T]he plain language of the enacted text is the best indicator of intent.").

(3) Congress confirmed the uniqueness of the MCA and its protections for classified information through the statute's structure. Rather than codifying it as an amendment or appendix to the UCMJ, and rather than simply incorporating or cross-referencing CIPA, Congress specifically enacted the military commissions process as a separate and independent chapter (47A) of title 10. This structure underscores that the MCA (in general) and its protections for classified information (in particular) are distinct from—and more expansive than—anything that came before it.

(4) The underlying principle reflected in the text and structure of the MCA—that the Act created a system of military commissions distinct in practice and procedure from existing regimes—was widely recognized by the Act's congressional supporters and detractors alike. Advocates lauded the bill for precisely this characteristic, arguing that a new kind of tribunal was needed to address the novel threats faced by the United States in fighting the War on Terror. Senate Majority Leader Frist, one of the co-sponsors of S. 3930 (the version of the MCA ultimately passed into law), explained that the bill's procedures for military commissions "recognize that because we are at war, we should not try terrorists in the same way as our uniformed military or common civilian criminals." 152 Cong. Rec. S-10243 (daily ed. Sept. 27, 2006) (statement of Sen. Frist). Rather, Senator Frist cautioned, "[w]e must remember that we are fighting a different kind of enemy in a different kind of war." Id Senator Graham similarly stated his belief that "we have created a new military commission . . . [a] court martial is not the right forum to try enemy combatants-non-citizen terrorists-the military commission is the right forum." 152 Cong. Rec. S-10354, 10392 (daily ed. Sept. 28, 2006) (statement of Sen. Graham). Senator Chambliss likewise argued that the bill "provides important rule of law procedures for illegal enemy combatants, [but] it does not give them the same protections which we afford lawful enemy combatants or our own military personnel, and that is a critical distinction." Id. at S-10391 (statement of Senator Chambliss). In the House debates on H.R. 6166 (the parallel bill to S. 3930) Representative Hunter, Chairman of the House Armed Services Committee, made the point even more clearly: "In this act, Congress authorizes the establishment of military commissions for alien unlawful enemy combatants . . . in a new separate chapter of title 10 of the U.S. Code, chapter 47A. While this new

chapter is based upon the Uniform Code of Military Justice, it creates . . . *an entirely new structure for these trials*." 152 Cong. Rec. H-7522, 7534 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter) (emphasis added).

(5) Nor was the point lost on the MCA's opponents. For example, Rep. Langevin opposed the bill because, in his view, "the commissions it would establish vary significantly from other accepted forms of tribunals that have been used to prosecute crimes in times of war." See 152 Cong. Rec. H-7522, 7557-58 (statement of Rep. Langevin). Similarly, Senator Levin decried the bill because "instead of starting with the rules applicable in trials by court-martial and establishing exceptions, the Secretary of Defense is required to make trials by commission consistent with those rules only when he considers it practicable to do so." 152 Cong. Rec. S-10243, 10244 (daily ed. Sept. 27, 2006) (statement of Sen. Levin); see also id. at 10259 (statement of Sen. Reed) (arguing that the MCA "reverses the presumption" found in earlier legislation and suggesting that "[t]he exception has swallowed up the rule").

(6) The text, structure, and legislative history make clear that the MCA, and the procedures it authorizes, are unprecedented. Thus, the UCMJ and CIPA may be helpful as reference points, but only insofar as they establish a baseline from which the MCA's protections for classified information began and expanded.

b. The Language of Section 949d of the MCA Does Not Foreclose the Secretary of Defense From Authorizing *Ex Parte* Discovery Proceedings.

(1) The gravamen of Khadr's argument is that, save for two particularized exceptions, section 949d of the MCA authorizes the presence of the accused at all "proceedings." Then, relying upon a generic definition of the term "proceedings" lifted from a dictionary, he maintains that the process of submitting classified material to the Military Judge, under M.C.R.E. 505(e)(3) for *ex parte* review constitutes such a "proceeding" to which the accused is entitled to be present. Therefore, he concludes, insofar as that rule authorizes such "proceedings" to be conducted *ex parte,* it is in conflict with the governing statute and should be disregarded.

(2) Khadr's argument proves too much. The MCA specifically provides for *ex parte* review on matters falling outside section 949d's designated exceptions, making clear that Congress specifically understood the definition of "proceeding" to be limited and that the Military Judge, like his counterpart in courts-martial and federal trials, would have the ability to review classified information outside the presence of the Defense and the accused. Thus, it is apparent from the language of section 949d of the MCA that—like other judicial activities relating to the protection of national security information—the *ex parte* review of classified information was not intended by Congress to fall within the ambit of the term "proceeding."

Section 949d(b) provides as follows:

PROCEEDINGS IN PRESENCE OF ACCUSED – except as provided in subsections (c) and (e), all proceedings of a military commission under this chapter, including any consultation of the members with the military judge or counsel, shall –

(1) be conducted in the presence of the accused, defense counsel and trial counsel; and

(2) be made part of the record.

(3) The statute then identifies the two "proceedings" to which the right to "presence of the accused" does not apply. The first, contained in subsection (c), provides that, during deliberations or voting, only the members may be present. The second, contained in subsection (e), authorizes the exclusion of the accused from the proceedings, under certain circumstances, for contumacious conduct. Reading these provisions alone and out of context, Khadr argues that, because the review of classified information is not in either of the two paragraphs identifying "proceedings" from which the accused is excluded, it must be one where his presence is permitted.

(4) However, "[o]ver and over the [Supreme Court] has stressed that, '[i]n expounding the meaning of a statute, we must not be guided by a single sentence, or a member of a sentence but must look to the provisions of the whole law and to its objects and policy.'" United States National Bank of Oregon v. Indep. Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993), (quoting United States v. Heris of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)). Thus, the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute and consulting any precedents or authorities that inform the analysis." Dolan v. U.S. Postal Service, 546 U.S. 481, 486 (2006). As explained above, one of the primary purposes of the MCA—as evidenced by its text, structure, and history—was to provide broad protections for classified information during military commission proceedings, an objective that is squarely at odds with Khadr's construction of section 949d. Even more significantly, however, when that section is considered from the perspective of "the whole statutory text" (id.)—as opposed to Khadr's myopic analysis of section 949d—it is manifest that the term "proceeding" does *not* extend to judicial assessments of matters relating to the disclosure of national security information.

(5) More specifically, section 949d identifies three instances when the military judge can review such material outside the presence of the accused—and, importantly, these instances fall outside of the "exceptions" of the accused's right to be present for "proceedings" listed in subsections (c) and (e). First, in making a determination under section 949d(d)(2) that closure of a military commission proceeding is necessary for reasons of national security, such finding "may be based upon a presentation, *including a presentation ex parte or in camera,* by either trial counsel or defense counsel." See section 949d(d)(3) (emphasis added). Section 949d(f) governs the "national security privilege" and the protection of classified information, and subsection (f)(2)(C) addresses the trial counsel's right to assert an objection based upon the national security privilege during the examination of a witness. The latter provides as follows:

> Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge *in camera and on an ex parte* basis and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

(emphasis added). Finally, section 949d(f)(3) similarly provides that "[a] claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and *shall not be disclosed to the accused.*" (emphasis added).[1]

(6) Thus, although section 949d(b) articulates the general principle that the accused is entitled to be present at all "proceedings" and identifies two specific "proceedings" that constitute exceptions to that general principle, when considered in its totality, the very same statute also identifies three additional occasions—each involving the evaluation of classified information—in which the accused is not entitled to be present: a hearing on whether, for reasons of national security, the proceedings should be closed to the public (section 949d(d)(3)); a review of the trial counsel's objection, based on the national security privilege, in connection with a witness's examination (section 949d(f)(2)(C)); and consideration of other claims of a national security privilege and materials in support thereof, upon request of the Government (section 949d(f)(3)). Inasmuch as these exceptions to the right of presence are *not* included in the express limitations upon that right, the only logical conclusion is that Congress did not view occasions upon which the military judge is required to evaluate classified information or matters relating to the disclosure of such information as a "proceeding" governed by section 949d(b). Consequently, an *ex parte* discovery review by the military judge of classified information likewise does not constitute a "proceeding," and the Secretary of Defense's authorization of such a review in the Manual for Military Commissions therefore cannot contravene the accused's statutory right to presence at "proceedings."

(7) Finally, it bears noting that if the defense's interpretation of the MCA were correct, it would be impossible for this or any military commission proceeding to go forward without jeopardizing national security. The protections for classified information in the MCA—including those that allow deletions of classified material and the substitution of unclassified summaries in the materials provided to the defense—were

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[1] Section 949d(f)(3) establishes a floor, which requires all deliberations conducted thereunder to be conducted—at a minimum—in camera, outside the presence of the accused, and without ever informing the accused of the deliberations. Section 949d(f)(4) authorizes the Secretary of Defense to expand upon those protections, and the Secretary did so in M.C.R.E. 505(e)(3) by excluding defense counsel as well. As Khadr recognizes, defense counsel's right (or the lack thereof) to participate during *in camera* proceedings is a "distinct issue," which is not currently before the Court. Def. Mot. at 5 n.17. If and when Khadr raises such a claim, the Government respectfully requests the opportunity to oppose it through a supplemental pleading.

enacted precisely to prevent unlawful enemy combatants from *ever* having access to certain extraordinarily sensitive material. It would thwart the purpose of the MCA (in general) and its classified-information provisions (in particular) if the accused were entitled to review classified materials while the Military Judge is considering whether the defense is entitled to review them. Moreover, as noted in ¶ 6(d), infra, federal courts under CIPA and courts-martial under Military Rule of Evidence 505 routinely review such materials, and discuss them with the Government, outside the presence of the accused. Given the text, structure, and purpose of the MCA, it is impossible that the Military Judge lacks such authority here.

c. The Secretary Of Defense Acted Well Within His Authority In Promulgating M.C.R.E. 505(e)(3) and His Judgment In Doing So Is Entitled to Judicial Deference.

(1) As explained above, Section 949d(b) constitutes no statutory barrier to an evidentiary rule authorizing *ex parte* examination of classified information in connection with making judicial discovery determinations. In this Section, we demonstrate that, even if the statute is arguably ambiguous as to whether a military judge possesses such authority, the courts should defer to the judgment of the Secretary of Defense who is statutorily responsible for the promulgation of implementing rules, including, specifically, rules governing the protection of national security information.

(2) The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations." Chevron, U.S.A, Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843 (1984) (footnote and citations omitted). As the Chevron Court explained:

> If [in reviewing an agency's construction of a statute] the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843. Thus, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to a specific provision of the statute." Id at 844 (footnote omitted). See, e.g., United States v. Meade Corp, 533 U.S. 218, 227 (2001).[2]

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[2] It is a well-established principle that an agency's interpretation of its organic statute to establish procedural rules to govern an intra-agency adjudication are worthy of

(3) It is without doubt that, in enacting the MCA, Congress has "express[ly] delegat[ed] authority to the [Secretary of Defense] to elucidate a specific provision of [the MCA] by regulation." Chevron, 467 U.S. at 843. First, in a general sense, Congress has directed the Secretary of Defense to promulgate "[p]retrial, trial and post-trial procedures, including elements, and modes of proof, for cases triable by military commission under this chapter . . . in consultation with the Attorney General. Such procedures shall, so far as the Secretary considers practicable or consistent with military intelligence activities, apply the principles of law and the rules of evidence in trial by general court-martial [but] may not be contrary or inconsistent with [the MCA]." See 10 U.S.C. § 949a(a).

(4) Specifically, with respect to classified information, section 949d(f)(4) further provides:

> ADDITIONAL REGULATIONS – The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information during proceedings of military commissions under this chapter. A report on any regulation so prescribed, or modified, shall be submitted to the Committed on Armed Services of the Senate and the House of Representatives not later than 60 days before the date on which such regulations or modifications, as the case may be, go into effect.

(5) In other words, under the MCA, Congress provided a number of specific protections for classified information but recognized that it was not necessary to fix all of those procedures in statute. Rather, Congress specifically delegated to the Secretary of Defense the authority to "prescribe additional regulations for the use and protection of classified information." In this regard, Congress's action was consistent with the approach taken under the court-martial system, where the procedures authorizing *ex parte* and *in camera* review under Military Rule of Evidence 505 are set out by rule, rather than in the statute. In the exercise of his authority under the MCA (see Manual for Military Commissions, Foreword and Preamble), the Secretary of Defense issued M.C.R.E. 505(e)(3). It provides:

> (3) *Alternatives to discovery of classified information.* The military judge, upon motion of the Government, shall authorize, to the extent practicable, (A) the deletion of

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Chevron deference. See, e.g., De Sandoval v. U.S. Att'y Gen., 440 F.3d 1276, 1281 (11th Cir. 2006) (applying Chevron to Attorney General's promulgation of procedures for granting removal hearings to aliens in immigration adjudications within the Department of Justice). Regardless of whether Chevron applies to the Secretary's interpretation of the MCA's provisions for substantive offenses, see 10 U.S.C. §§ 950p-950w, it is incontestable that Chevron applies to the procedural rules that govern this motion.

> specified items of classified information from materials to be made available to the defense; (B) the substitution of a portion of summary of the information for such classified materials, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, subject to subsection (e)(4) of this rule. The government's motion and any material submitted in support thereof shall, upon request of the government, be considered by the military judge *in camera* and *ex parte*.

(6) Just as there can be no doubt that M.C.R.E. 505(e)(3) was the result of an express delegation of authority by Congress to the Secretary of Defense, there is little doubt that it satisfies the additional requirements for Chevrondeference. First, in enacting the MCA (in general), and section 949d(f) (in particular), "Congress has not directly spoken to the precise question," Chevron, 467 U.S. at 843, as to the procedure for a judicial determination whether classified national security information is discoverable despite its statutory entitlement to particular protection from unnecessary disclosure. Rather, Congress specifically delegated the authority to set those procedures to the Secretary of Defense, and M.C.R.E. 505(e)(3) "fill[s] [the] gap left, . . . explicitly by Congress." Id. at 843-44.

(7) Nor can it be said that M.C.R.E. 505(e)(3) is not entitled to "controlling weight," Chevron, 467 U.S. at 844, on the ground that it is "arbitrary, capricious, or manifestly contrary to the statute." Id. (footnote omitted). As explained above, nothing in section 949d addresses the specific issue of whether judicial review of classified material for the purpose of complying with discovery obligations is a "proceeding" to which the accused our defense counsel is entitled to participate. To the contrary, it is evident that, by expressly providing for the exclusion of the accused and counsel from similar determinations involving classified information but omitting mention of such occasions in the particularization of "proceedings" in which the accused could be excluded, see10 U.S.C. § 949d(b), Congress did *not* intend such reviews to fall within the ambit of the term "proceedings." Accordingly, it was not "manifestly contrary to the statute" for the Secretary to treat judicial determinations relating to the discovery of classified information to the defense in a like manner, viewing them as not a "proceeding" in which the accused or counsel was entitled to participate.[3]

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[3] Indeed, consistent with Section 949d(b)'s apparent determination that judicial assessments concerning the disclosure of classified information did not constitute "proceedings," the Secretary of Defense promulgated M.C.R.E. 505(b)(3) which expressly excluded *in camera* proceedings regarding the assertion of the national security privilege from the ambit of the term: It provides:

> *In camera presentation.* In accordance with 10 U.S.C. § 949d(f)(2)(C), an *in camera* presentation is not a "proceeding" within the meaning of 10 U.S.C. § 949d(b). Unless conducted *ex parte*, such presentations may be conducted as a conference under the provisions of R.M.C. 802, except that, at the

(8) Khadr observes that the provision of the MCA specifically dealing with the disclosure of classified information in connection with discovery and therefore "most relevant to any evaluation of M.C.R.E. 505(e)(3)" is 10 U.S.C. § 949j(c). Def. Mot. at 6 para. (5). In that connection, he observes that nothing in section 949j(c) expressly authorizes *ex parte* contact with the military judge in connection with the trial counsel's responsibilities for protecting classified information during the discovery process. Such an observation, however, is entirely beside the point. The consideration that is of salient importance for the purpose of Chevron is that nothing in that Section (or any other) forecloses the Secretary from promulgating an evidentiary rule requiring such determinations to be conducted *ex parte* at the behest of the Government. And, of equal importance, the authority granted the Secretary under section 949d(f)(C)(4) to issue rules governing the use and protection of classified information at military commission proceedings, is amply sufficient to embrace discovery matters relating to classified information under section 949j(c).[4]

(9) Khadr also cites Military Rule of Evidence ("M.R.E.") 505(g)(2), which provides for an *in camera* proceeding during courts-martial to determine whether classified information, subject to a claim of privilege, is discoverable. Apparently his rationale for the citation to a parallel provision of the rules of evidence governing courts-martial is to demonstrate that, in promulgating those rules, the President did not expressly provide that such proceedings also be conducted ex parte. But, as Khadr concedes, although this rule does not employ the phrase "*ex parte*" *in haec verba*, it provides that "[t]he government's motion and any materials submitted in support thereof shall, upon request of the government . . . not be disclosed to the accused." Thus—insofar as the accused is denied the right to be present—M.R.E. 505(g)(2) has the same effect as its

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> request of the trial counsel, the accused shall be excluded. . . . If so provided in this rule, an *in camera* presentation may be *ex parte*, in which case the presentation will be made by the trial counsel, in writing, to the military judge outside the presence of the accused and defense counsel.

(10) Khadr also argues (Def. Mot. at 6 para. (5)) that, because MCA Section 949(f)(2)(C) expressly authorizes the military judge of a military commission to entertain *ex parte* submissions by the trial counsel in connection with the assertion of a national security privilege at trial, the canon of construction *expressio unius est exclusion alterius* suggests that Congress intended to preclude *ex parte* contact between the trial counsel and the judge for the purpose of assessing discovery obligations. Such a canon of construction, however, does not apply to a statute in which Congress has expressly stated that the Secretary of Defense should prescribe additional procedures beyond those specified in the statute. See 10 U.S.C. § 949a(a). Congress here clearly did not intend to specify the procedures for the protection of classified information—and to exclude all others—but rather, intended to specify some and to leave the additional procedures to be defined by regulation.

counterpart governing classified discovery in connection with military commission proceedings.

(11) To be sure, M.R.E. 505(g)(2) and M.C.R.E. 505(e)(3) differ in that the latter rule authorizes *ex parte* proceedings, while the former refers only to "*in camera* proceedings." Khadr is simply wrong, however, in his suggestion that the MCA admonished the Secretary of Defense to model implementing rules governing military commissions upon practices and procedures governing courts-martial. SeeDef. Mot. at 6 para. 6. To the contrary, the MCA requires adherence to court-martial procedures only "so far as the Secretary considers [such consistency] practicable or consistent with military or intelligence activities . . . ." 10 U.S.C. § 949a(a); see also 152 Cong. Rec. S-10243, 10244 (daily ed. Sept. 27, 2006) (statement of Sen. Levin) (emphasizing this point). Thus, particularly where intelligence equities are involved, the legislation affords the Secretary necessary discretion to promulgate a more restrictive rule governing the presence or involvement of defense counsel in the process of determining the propriety of disclosing classified information than that which arguably governs courts-martial. Indeed, as we explain later, the practice of excluding defense counsel from deliberations relating to the discoverability of classified information generally governs such proceedings in the federal courts and has been repeatedly sustained in the face of judicial challenge.

(12) Finally, there is no merit to Khadr's claim (Def. Mot. at 6-7, para. 8) that the presence of the accused during judicial determinations relating to the discovery of classified information is compelled by Common Article 3 of the 1949 Geneva Conventions. To the contrary, Common Article 3 simply does not address the issue. Moreover, insofar as Common Article 3 purports to require the trial of an accused by a "regularly constituted court," *i.e.* one "'established and organized with the laws and procedures already in force in a country,'" (Def. Mot. at 7, quoting Hamdan v. Rumsfeld, 126 S. Ct. 2740, 2797 (2006)), the procedure of excluding the defendant from judicial deliberations concerning the discoverability of classified or sensitive information plainly so qualifies. In any event, section 948b(g) precludes Khadr from "invok[ing] the Geneva Conventions as a source of rights," and section 948b(f) also emphasizes that "[a] military commission established under [the MCA] is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."

d. Under Principles of Law Governing Federal Courts, Ex Parte Proceedings To Determine the Discoverability Of Material in the Hands of the Government, Including Classified Information Are Plainly Permissible.

(1) There is yet an additional reason to defer to the Secretary's determination, in promulgating the *ex parte* provision contained in M.C.R.E. 505(e) (3). The practice is fully consistent with federal statutory and procedural norms governing the same matter and is supported by federal jurisprudence rejecting challenges to it. Accordingly, it can hardly be said that the Secretary adopted a novel practice lacking a congressional or judicial pedigree or otherwise acted in a manner that Congress would not have sanctioned. Cf. Chevron, 467 U.S. at 845 (administrative interpretations of a statute should not be

disturbed "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").[5]

(2) Perhaps most significantly, section 4 of CIPA, 18 U.S.C. Supp. III, provides in part (emphasis added):

> **Discovery of classified information by the defendants**
> The court, upon a sufficient showing, may authorize the United States to delete specific items of classified information from documents to be made available to the defense through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. *The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone.*

(3) Likewise, Fed. R. Crim. P. 16(d), captioned "Regulating Discovery," provides, in part, as follows:

> **Protective and Modifying Orders.** At any time the court may, for good cause, deny restrict or defer discovery or inspection, or grant any other appropriate relief. The court may permit a party to show good cause by written statement that the court will expect *ex parte*.

(4) Thus, both the provision of CIPA that is most analogous to M.C.R.E. 505(e)(3), and Fed. R. Crim. P. 16(d), which has an earlier origin, authorize the Government to make *ex parte* submissions in connection with claims that particular items of information are either not discoverable, or that such discovery should either be curtailed or substitutions permitted.

(5) The courts that have addressed the question in the wake of these enactments, have repeatedly sanctioned the use of *ex parte* hearings to determine the Government's

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[5] In the same vein, it is well settled that "'[w]e assume that Congress is aware of existing law when it passes [new] legislation.'" South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351 (1998) (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)). Thus, when Congress enacted the MCA, it was presumptively aware that its prior legislative enactments concerning the resolution of discovery issues in cases involving classified sensitive information, expressly authorized judicial resolution via *ex parte* proceedings, and that such proceedings have withstood subsequent judicial scrutiny. Nothing in the MCA suggests that, in cases involving the discovery of national security information in the context of military commission proceedings, Congress intended to provide for less protection of classified information than its prior legislative practice in treating the same issue.

discovery responsibilities, even rejecting claims—similar to Khadr's—that such procedures should not permit argument or written submissions by the Government. For example, in United States v. Klimavicius-Violria, 144 F.3d 1249 (9th Cir. 1998), the court observed that, although *ex parte* hearings are generally disfavored, "[i]n a case involving classified documents, . . . *ex parte, in camera* hearings in which government counsel participates *to the exclusion of defense counsel* are part of the process that the district court may use in order to decide the relevancy of the information. Such a hearing is appropriate if the court has questions about the confidential nature of the information or its relevancy." Id. at 1261 (emphasis added); see also United States v. O'Hara, 301 F.3d 563, 568 (7th Cir. 2002) (holding that district court properly conducted *in camera, ex parte* proceedings to determine whether classified information was discoverable); United States v. Marzook, 435 F. Supp. 2d 708, 745 (N.D. Ill. 2006) ("the plain text of [CIPA] Section 4 specifically permits a court to review classified information ex parte"); United States v. Libby, 429 F. Supp. 2d 46, 48 (D.D.C. 2006) (opinion on reconsideration) (authorizing the government to make *ex parte* "filings it deems appropriate, necessary and permissible under [CIPA] Section 4"); United States v. Abujihaad, 2007 WL 2972623, at *1 (D. Conn. Oct. 11, 2003) (noting that "numerous courts have upheld the propriety of *ex parte, in camera* proceedings in cases involving classified information"; collecting cases); United States v. Ressam, 221 F. Supp. 2d 1252, 1258 (W.D. Wash. 2002) ("*ex parte, in camera* hearings for the purpose of pretrial discovery rulings are entirely consistent with CIPA").[6]

(6) The courts have, likewise, uniformly rejected arguments that such hearings should, in any event, include the presence and participation of defense counsel. Specifically, they have reasoned that such involvement would effectively frustrate the overarching purpose of the *ex parte* procedures set out in Section 4 of CIPA and Fed. R. Crim. P. 16(d). In United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988), for example, the court addressed the argument that Section 4 did not authorize the Government to assert and litigate a claim of privilege *ex parte and in camera*. In rejecting this argument, it observed that:

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[6] In its 5 December 2007 ruling outlining the procedures for dealing with *ex parte* matters (Def. Mot. Att. C), this Court indicated that it would accept the Government's written motion and other materials submitted in support thereof from the prosecutor—but added that "there will be no words exchanged." Of course, such an environment does not allow for questions to be asked by the Court and addressed by the Government, or for clarifications to be made. Accordingly, silence between the Court and trial counsel should not be required; rather, employing the use of a court reporter with the appropriate security clearance would be a better alternative. It appears that the Court's instruction may have been based upon the language of M.C.R.E. 505(b)(3), which states that an *in camera, ex parte* presentation "will be made by the trial counsel, in writing, to the military judge, outside the presence of the accused and defense counsel." As the cases cited above clearly indicate, however, Article III courts have recognized that although CIPA Section 4 speaks only of the Government submitting a written statement, "*ex parte, in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use," particularly "if the court has questions about the confidential nature of the information or its relevancy." Klimavicius-Viloria, 144 F.3d at 1261.

> [t]he clear language of the statute and its legislative history foreclose that contention. Section 4 allows the court to "permit the United States to make a request . . . in the form of a written statement to be inspected by the court alone. . . . The legislative history [of CIPA] emphasizes that "since the government is seeking to withhold classified information from the defendant, an adversarial hearing with defense knowledge would defeat the very purpose of the discovery rules." H.R. Rep. No. 831, 96th Cong. 2d., Sess. 27 n. 22.

Id. at 965-66 (citations omitted). And, likewise, in United States v. Meja, 448 F.3d 436, 457 (9th Cir. 2006), the court rejected the claim that "CIPA contemplates that judicial determinations regarding the disclosure of classified information will be made with the participation of the defendants and their counsel . . . ." It reasoned that "as the House Report [concerning the legislation that was to become CIPA] explains, 'since the government is seeking to withhold classified information from the defendant an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.'"[7]

(7) In the context of military commission proceedings, it would likewise be an absurd construction of section 949j(c)(2), which authorizes the Government, in the course of complying with discovery obligations, "to protect from disclosure, sources, methods, or activities by which evidence," to disregard the very procedure, set out in M.C.R.E. 505(e)(3), for *ex parte* determinations whether such items are subject to discovery. As in the case of CIPA and Fed. R. Crim. P. 16(d), the presence of the accused and counsel at such a proceeding would frustrate its objective, exposing them to the very material that the Government is seeking to protect from disclosure via a judicial determination that it is either not discoverable or that the defendant's discovery rights can adequately be protected by the redaction of sensitive but irrelevant details. If Congress sought to prevent such consequences, via the enactment of CIPA and Fed. R. Crim. P. 16(d), in federal criminal trials (see, e.g., H.R. Rep. No. 96-831, pt. 1 at 27 n. 22 (1980)), it surely would not have intended a different results in trials involving unlawful enemy combatants where the stakes, involving the inadvertent or unnecessary disclosure of classified information, are immeasurably higher.

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[7] It is puzzling—to say the least—for Khadr to suggest that Defense counsel should be permitted to participate in *ex parte* proceedings under M.C.R.E. 505(e)(3) because "any information the government would seek to disclose to the military judge *ex parte* would appear to be within the scope of the government's discovery obligations." Def. Mot. at 5 n.17. The very purpose of such a hearing is to obtain a judicial determination whether the material at issue is discoverable and, in the event that it is, to obtain a judicially satisfactory substitute, excerpt, or redaction that can be provided to the defense. Nor is it of consequence that the accused's attorney possesses a security clearance. If the classified material at issue is not discoverable in the first place, even cleared counsel has no need or right to possess it.

7. Oral Argument: In light of the fact that the MCA directly and conclusively addresses the issue presented, the Prosecution believes that the motion could be readily denied. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:

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	D015
UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Reply to Prosecution Response to Defense Motion For Appropriate Relief** (to Preclude Further Ex Parte Proceedings Under Color of M.C.R.E. 505(e)(3)) 24 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Reply:**

(a) The government devotes much of its response to explaining why it wishes Congress had said something other than what it plainly did say with respect to the issue at hand. (*See* Gov't Resp. at 2-4; 11-14.) Alternatively, the government contends that Congress was sufficiently unclear so as to leave the Secretary free to promulgate MCRE 505(e)(3). (*See* Gov't Resp. at 7-10.) Neither argument has merit.

(1) The Accused And Defense Counsel Have An Unambiguous Right To Be Present At All Proceedings Of A Military Commission And The Secretary Of Defense Does Not Have Authority To Issue A Rule Contravening This Right

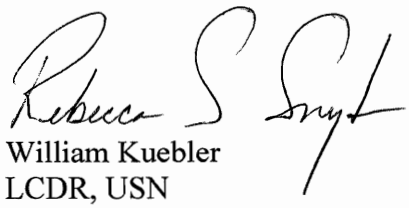
(i) With certain limited exceptions not applicable here, Congress unambiguously provided for the right of the accused (and counsel) to be present during all proceedings of a military commission. MCA § 949d(b). With regard to the actual issue before the Commission (i.e., whether MCRE 505(e)(3) is consistent with the plain language of MCA § 949d(b)), the government's entire argument boils down to an attempt to make the word "proceedings" mean something other than what it obviously (as a matter of law and common sense) means, and then argue that because the MCA authorizes proceedings that are something other than proceedings (let's call them "procedures"), the Secretary is free to prescribe rules allowing for such "procedures" as he sees fit. This argument is unsound.

(ii) Because Congress specified that the accused has a right to be present during all proceedings of a military commission and then carved out exceptions to the general rule, it does not follow that the exceptions are not "proceedings" of the military commission. And it certainly does not follow that the Secretary is free to disregard the provisions of the MCA in formulating procedures for trial by military commission as long as he calls the procedures something other than "proceedings." The net effect of the government's interpretation of the statute is that a "proceeding" of the military commission is whatever the Secretary says it is – an interpretation

that would render Congress' express statement preserving the right to be present at all proceedings of the commission a virtual nullity.

(iii) The government's citation to MCA § 949d(d)(3) *weakens* its position. (Gov't Resp. at 5.) Again, where Congress intended to authorize the extraordinary measure of *ex parte* proceedings it did so explicitly. The government's argument would have the Commission believe (and rule) that Congress used the terms *ex parte* and *in camera* (two terms with distinct legal significance) interchangeably.

(iv) Finally, the government's assertion that agreement with the defense position would make it "impossible for this or any other military commission proceeding to go forward without jeopardizing national security" is incredible. (*See* Govt't Resp. at 6-7.) Concluding, correctly, that MCRE 505(e)(3) is inconsistent with MCA § 949d(b) does not mean that the accused would gain access to "extraordinarily sensitive material" or "thwart the purpose of the MCA" (provided the "purpose of the MCA" is *not* something other than to provide a fair trial for the accused). As a practical matter it means that the accused would be present during an *in camera* review for purposes of a government claim of privilege in the course of discovery (consistent with Congressional intent), and that the accused's *counsel* (with appropriate security clearance) would have access to the information. What the government desires is a world in which it can seek to persuade in opposition to an empty chair and in which the prosecutor, as a function of his own whim, or the whim of whatever powers in the Executive are directing his actions, can decide which secrets to share with defense counsel in discovery and which ones not to. Whatever else Congress intended in enacting the MCA, it did not intend this result. We must presume that it would have said so if it did. Instead, it said the contrary.



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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss Specification 2 of Charge IV for Multiplicity and Unreasonable Multiplication of Charges 11 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 28 November 2007 scheduling order.

2. **Relief Sought:** Mr. Khadr moves to dismiss specification 2 of Charge IV ("Providing Material Support for Terrorism") for multiplicity and unreasonable multiplication of charges.

3. **Overview:**

(1) Multiplicty and unreasonable multiplication of charges are two distinct concepts. *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). Multiplicity occurs if a court, "contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007) (citing *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). Multiplicity is present in this case because the prosecution has charged Mr. Khadr with two violations of the same statutory provision (10 U.S.C. § 950v(b)(25), Providing Material Support for Terrorism) based on the same alleged misconduct. Furthermore, specification 2 of Charge IV is a lesser included offense of specification 1 of the same charge.

(2) Even if offenses are not multiplicious as a matter of law, the prohibition against unreasonable multiplication of charges allows military judges to address prosecutorial overreaching by imposing a standard of reasonableness. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006) (finding an unreasonable multiplication of charges). In this case, the prosecution has unreasonably multiplied the Material Support for Terrorism charges against Mr. Khadr requiring dismissal of specification 2 of Charge IV.

4. **Burdens of Proof and Persuasion:** The burden of persuasion on this motion rests with the moving party. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

5. **Facts:** This motion presents a question of law.

6. **Law and Argument:**

a. Specification 2 Of The Providing Material Support For Terrorism Charge Is Multiplicious With Specification 1 Of The Same Charge And Therefore Should Be Dismissed

(1) The Discussion to Rule for Military Commissions (R.M.C.) 907(b)(3) states that a specification may be multiplicious with another if it alleges "an offense necessarily included" in

another alleged offense or describes "substantially the same misconduct in two different ways." The prohibition against multiplicity is necessary to ensure compliance with the statutory and constitutional restrictions against double jeopardy. *Quiroz*, 55 M.J. at 337. The statutory prohibition against double jeopardy contained in section 949h of the Military Commissions Act (MCA) is identical to the statutory prohibition against double jeopardy found in Article 44 of the UCMJ. 10 U.S.C. § 844; § 949h (2006). Unless expressly authorized by Congress, two convictions for the same offense at the same trial constitute double punishment. *United States v. Neblock*, 45 M.J. 191, 195 (C.A.A.F. 1996) (internal citations omitted).

(2) The charge sheet in this case describes "substantially the same misconduct in two different ways." R.M.C. 907(b)(3) discussion. As a result, Mr. Khadr faces multiple convictions for the same acts of alleged misconduct. Both specifications 1 and 2 of Charge IV allege that Mr. Khadr provided himself as a resource. The specifications plead the manner in which he allegedly provided himself as a resource identically. And these identical acts of alleged misconduct are the sole factual basis for the specifications. By charging single acts of alleged misconduct as both material support to a terrorist organization and material support for terrorism, the prosecution seeks to expose Mr. Khadr to the risk of multiple convictions for the same alleged misconduct.

(3) Courts presume that where two statutory provisions proscribe the same offense, the legislature does not intend to impose two punishments for that offense. *Rutledge v. United States*, 517 U.S. 292, 298 (1996) (citing *Whalen v. United States*, 445 U.S. 684, 691-92 (1980)). "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83-84 (1955). To determine whether convictions under separate statutes constitute one or multiple offenses courts look to the language of the statutes, how those statutes fare under the *Blockburger* test, and express congressional intent, if any, on the issue of multiple punishment. *See United States v. Gore*, 154 F.3d 34, 44 (2d Cir. 1998) (citing *United States v. Muhammad*, 824 F.2d 214, 218 (2d Cir. 1987)).

(4) This Court must determine whether Congress, in enacting 10 U.S.C. § 950v(b)(25), intended to make material support for terrorism and material support for a terrorist organization punishable as two separate offenses, or whether it intended to define alternative offenses, one requiring proof of fewer facts than the other. While the legislative history is silent on this point, an application of the *Blockburger* test indicates Congress intended to penalize either one of two alternative offenses, one of which was a lesser included offense of the other, but did not intend to make the same conduct punishable as two separate offenses.

(5) According to the *Blockburger* test, if "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether *each* provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (emphasis added). When applying the *Blockburger* test, the Supreme Court has "often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other." *Rutledge*, 517 U.S. at 297. Thus, a lesser included offense is not a separate offense subject to additional punishment because it does not contain a unique element absent from the elements necessary to prove the greater offense. "If proof of a greater offense proves all the elements of another

offense and more, then the other offense is a subset of the elements. Conversely, if proof of the 'subset' is necessary to prove the greater offense, then the 'elements test' is met" and the conduct satisfying the subset of elements should not be deemed a separate offense in addition to the greater offense. *United States v. Foster*, 40 M.J. 140, 143-44 (C.M.A. 1994).

(6) At the outset, unlike in *Blockburger*, this case does not involve the violation of separate statutes, but "the interpretation of two phrases in one sentence of a single law." *United States v. Hernandez*, 591 F.2d 1019, 1022 n. 9 (5th Cir. 1979). A comparison of the elements of these two phrases reveals that material support for terrorism is a lesser included offense of material support for a terrorist organization.

(7) There are four elements to providing material support to a terrorist organization:

(1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;

(2) The accused intended to provide such material support to such an international terrorist organization;

(3) The accused knew that such organization has engaged or engages in terrorism; and

(4) The conduct took place in the context of and was associated with an armed conflict.

In contrast, the crime of material support has only three elements:

(1) The accused provided material support or resources;

(2) The accused knew or intended that the material support or resources were to be used for terrorism as defined in paragraph (24); and

(3) The conduct took place in the context of and was associated with an armed conflict.

The three elements required to establish the crime of material support are fully encompassed within the elements of the crime of material support to a terrorist organization. The only additional element in the greater offense of material support to a terrorist organization is that the accused must have provided the support to an international organization engaged in terrorism rather than to terrorism without the involvement of an international organization. Like the statutes at issue in *Rutledge* and *Blockburger*, a guilty verdict on a charge of material support to a terrorist organization necessarily includes a finding that the defendant also provided material support to terrorism. Material support for terrorism is therefore a lesser included offense of material support to a terrorist organization. Accordingly, specification 2 of Charge IV is multiplicious with specification 1 of that charge and should be dismissed.

b. Specifications 1 And 2 Of The Material Support Charge Constitute And Unreasonable Multiplication Of Charges

(1) While multiplicity involves analysis of the statutes, their elements, and the intent of Congress, the prohibition against unreasonable multiplication of charges addresses those features "of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Quiroz*, 55 M.J. at 337. An accused cannot be charged with multiple offenses that stem from the alleged commission of only one criminal act. *See* R.M.C. 307(c)(4) (providing that within the charge sheet, "each specification shall state only one offense. What is substantially one transaction should not be the basis for an unreasonable multiplication of charges against one person."). Military judges must "exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *United States v. Foster*, 40 M.J. 140, 144 (C.M.A. 1994).

(2) A finding that there has been an unreasonable multiplication of charges can result in dismissal of charges and specifications. *See United States v. Esposito*, 57 M.J. 608, 610-611 (C.G.Ct.Crim.App. 2002) (dismissing a specification of wrongfully soliciting a false statement from a fellow crewmember, because the charge was based on the same act that led to a separate specification alleging obstruction of justice). If specifications are not dismissed, a finding that there has been an unreasonable multiplication of charges can result in consolidation of the specifications. *See United States v. Gilchrist*, 61 M.J. 785, 789 (Army Ct.Crim.App. 2005) (merging two specifications that described larceny of cash and Xanax pills into one specification because one act of stealing two items constituted a single larceny).

(3) To determine whether there has been an unreasonable multiplication of charges, courts use a five-factor test adopted in *Quiroz*: (1) whether the accused objected at trial that there was an unreasonable multiplication of charges and/or specifications (2) whether each charge and specification is aimed at distinctly separate criminal acts (3) whether the number of charges and specifications misrepresent or exaggerate the appellant's criminality (4) whether the number of charges and specifications unreasonably increase the appellant's punitive exposure and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N-M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003).

(4) In adhering to this test, courts have dismissed specifications that base more than one allegation on a single act. *See, e.g.*, *United States v. Christian*, 61 M.J. 560, 566 (N-M.Ct.Crim.App. 2005) (dismissing three specifications that were unreasonably multiplied because allegations of indecent language and assault consummated by a battery were brought in addition to an allegation of violation of lawful general order/sexual harassment). For example, in *United States v. Christian*, the court held that the language and assault were themselves the actions that specifically defined the sexual harassment, and thus they could not be charged separately. *Id.* at 567.

(5) In the instant case, specification 2 must be dismissed because it does nothing more than repeat accusations of the same activity alleged in specification 1. Specification 2 is entirely identical in content to specification 1, and differs only in the phrasing of the allegation. Both specifications allege that Mr. Khadr provided personnel (himself) in material support for

terrorism connected to al Qaeda. Specification 2 alleges that Mr. Khadr provided himself as personnel while he "knew or intended that the material support or resources were to be used for" "carrying out an act of terrorism." And the alleged means of providing material support to acts of terrorism relate to his alleged involvement with al Qaeda. Accordingly, Mr. Khadr's alleged support for acts of terrorism in specification 2 cannot be separated from his alleged support for al Qaeda. Specification 1 similarly alleges that Mr. Khadr provided himself as personnel to al Qaeda while he knew "al Qaeda . . . to be an organization that engages in terrorism." The specification then goes on to identify specific acts of terrorism in which al Qaeda has engaged. Thus, both specifications allege that Mr. Khadr provided the same material support for terrorism in connection to al Qaeda. The specifications are, therefore, not aimed at distinctly separate criminal acts as the conduct alleged within specification 2 is engulfed by the conduct alleged in specification 1.

(6) Indeed, the allegations in Charge III alleging Mr. Kahdr conspired with al Qaeda support this conclusion. Each of the alleged acts identified as providing material support to a terrorist act in Specification 2 are the exact acts identified as overt acts in support of Mr. Khadr's alleged conspiracy with al Qaeda. Thus, according to the allegations, the alleged acts of material support to carry out an act of terrorism are not separate from Mr. Khadr's alleged support of a terrorist organization.

(7) Twice charging Mr. Khadr for the same acts exaggerates his criminality. *See, e.g., United States v. Quiroz*, 57 M.J. 583, 586 (N.M.Ct.Crim.App. 2002) (finding criminal activity magnified where appellant was charged twice for the sale of the same C-4). It exposes him to being convicted and sentenced twice for the same conduct.

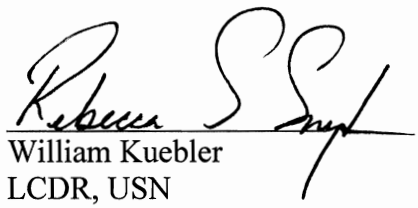
(8) Specification 2 serves no purpose other than to repeat allegations of the same criminal behavior alleged in specification 1. Since specification 2 is a lesser-included offense of specification 1, the government need not charge both specifications for purposes of contingencies of proof. Rather, the military judge must instruct the members on lesser-included offenses. R.M.C. 920(e)(5)(C). Charges both offenses under these circumstances amounts to prosecutorial overreaching. Thus, application of the *Quiroz* factors demonstrates that there has been an unreasonable multiplication of charges.

7. **Oral Argument**: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions." Oral argument will allow for thorough consideration of the issues raised by this motion.

8. **Witnesses and Evidence:** The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution's response raise issues requiring rebuttal testimony.

9. **Certificate of Conference:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

By: 

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UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"

D016

GOVERNMENT'S RESPONSE

To the Defense's Motion to Dismiss Specification 2 of Charge IV for Multiplicity and Unreasonable Multiplication of Charges

18 January 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion to dismiss Specification 2 of Charge IV for multiplicity and unreasonable multiplication of charges ("Def. Motion"), should be denied.

3. Overview:

a. The Defense has failed to meet its burden of persuasion, namely that Congress did not intend for material support for terrorist acts and material support for international terrorist organizations to be separate offenses. Congressional intent is clear in the statutory provisions from which 10 U.S.C. § 950v(b)(25) derives, 18 U.S.C. §§ 2339A and B, which are clearly separate offenses for trial and punishment.

b. Congressional intent can also be inferred following the analysis in *Blockburger v. United States*, 284 U.S. 299 (1932), and *United Stated v. Teters*, 37 M.J. 370 (C.M.A.1993), highlighting the different elements of each offense as evidence of intent to punish separate offenses. For instance, a finding of guilty for material support for terrorist acts requires proof of facts that material support of an international terrorist organization does not. This satisfies the *Blockburger* test even when there is "substantial overlap in the proof offered to establish the crimes." *Iannelli v. United States*, 420 U.S. 770, 785 n. 17 (1975). The distinct elements of each offense similarly precludes Khadr's claim that Specification 2 is a lesser included offense of Specification 1 of Charge IV.

c. Assuming the Court finds Specification 2 to be muliplicious with Specification 1, dismissal is not the appropriate remedy. A full reading of the Discussion of Rule for Military Commissions ("RMC") 907(b)(3) shows that "a Specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another Specification." RMC 907(b)(3) Discussion.

d. Finally, following the factors in U.S. v. Quiroz, 55 M.J. the Government has not overreached by charging the accused with material support for terrorist acts and material support for terrorism, and there is, therefore, no unreasonable multiplication of charges.

4. Burden and Persuasion: As the moving party, the Defense bears the burden of persuasion on this motion. *See* RMC 905(c)(2)(A).

5. Facts: The facts relevant to the Government's Response are provided in Specifications 1 and 2 of Charge IV of this case. AE XX

6. Discussion:

a. Specifications 1 and 2 of Charge IV are not multiplicious, as each Specification requires proof of distinct elements.

(1) The Defense has failed to meet its burden of persuasion that specifications 1 and 2 of Charge IV are multiplicious. The starting point for determining whether charges are multiplicious is *Blockburger v. United States*, 284 U.S. 299 (1932). The Supreme Court held that punishing a single act under two different statutes does not violate the Double Jeopardy Clause of the Fifth Amendment when each offense requires proof of a different element. *Blockburger*, 284 U.S. at 304-05. The Court looked to whether the underlying acts in the two charges were separate, then to the distinct elements of each offense.

(2) In this case, the Court need look no further than the separate underlying acts – Khadr's material support to terrorist acts, and his material support to an international terrorist organization. In *Blockburger*, the Court reasoned that separate acts exist when, "the individual acts are prohibited, or the course of action which they constitute." *Blockburger*, 284 U.S. at 302. Separate acts are best explained in an unpublished Air Force case. In *United States v. Augostini*, 1996 CCA LEXIS 381 (A.F.Ct. Crim. App. 1996) (unpub. op.), the accused was charged with the use of methamphetamine and willful dereliction of duty for going to work under the influence of the drug. The court upheld his conviction on both counts stating, "In this case, each offense was based on separate acts and contained different elements. Appellant was not convicted of dereliction of duty because he used methamphetamine. The willful dereliction was reporting for duty under the influence of the drug, which it was his duty not to do." *Id.* (citing *United Stated v. Teters*, 37 M.J. 370 (C.M.A.1993). Similarly, in the instant case, Khadr's misconduct supporting the charged offenses constitutes two separate and distinct offenses. One is conduct which supports an international terrorist organization, the other is conduct in support of specific terrorist acts. Each instance of conduct, ongoing as it may be, is prohibited as separate offenses, as is the "course of action which they constitute." *Blockburger*, 284 U.S. at 302.

(3) Furthermore, Defense counsel does not make the distinction between the continuous, ongoing nature of Specification 1 (material support to an international terrorist organization) and the multiple single acts identified in Specification 2 which

contribute to material support for *an act* of terrorism. *See eg. United States v. Neblock*, 45 M.J. 191, 197 (1996). The Court of Appeals for the Armed Forces held in *Neblock* that if the accused committed several crimes in separate acts, charging each act in separate Specifications does not violate the Double Jeopardy Clause. *Id.* The Supreme Court similarly held in *Garrett v. United States*, 471 U.S. 733 (1985), that it does not violate the Double Jeopardy Clause to prosecute a "continuing criminal enterprise" as well as the underlying drug offenses to the enterprise under the Comprehensive Drug Abuse and Prevention Control Act of 1970. 21 U.S.C. § 848 *et seq.* Assuming, hypothetically, that Khadr is correct in arguing that material support to a terrorist organization encompasses material support to terrorist acts, it would still not violate the Fifth Amendment to charge him with both offenses. As in *Garrett*, supporting terrorist acts can be charged in conjunction with the continuing enterprise of providing support to a terrorist organization.

(4) Following the *Blockburger* analysis, the next step is to determine whether Congress intended for an accused to be convicted and punished for material support for terrorist acts and material support for a terrorist organization. Khadr sites an application of the "*Blockburger* test"[1] as indication that Congress intended to penalize the separate and distinct theories of liability under 10 U.S.C. § 950v(b)(25) as one offense. But Khadr "misapprehend[s] the proper application of the *Blockburger* analysis" as it applies to the present charges against him. *United States v. Hassoun*, 476 F.3d 1181, 1186 (11th Cir. 2007). In fact, a correct reading of *Blockburger* gives rise to a "presumption of congressional intent to authorize cumulative punishments." *Hassoun*, 476 F.3d at 1185 (citing *United States v. Lanier*, 920 F.2d 887, 894 (11th Cir. 1991); *United States v. Boldin*, 772 F.2d 719, 729 (11th Cir. 1985)).

(5) The legislative history of the Military Commissions Act ("MCA") is silent on this matter. However, the Court need look no further than the legislation from which 10 U.S.C. § 950v(b)(25) derives, namely 18 U.S.C. §§ 2339A and B. Congress clearly intended to impose punishment for acts that would violate both 2339A (material support to terrorists, including terrorist acts) and 2339B (material support to designated foreign terrorist organizations). The fact that Congress drafted two distinct punitive provisions indicates that an accused may not only be convicted of both statutory sections, but also sentenced under each. Similar intent is found in the language of the MCA. Although 10 U.S.C. § 950v(b)(25) collapses 2339A and 2339B into one provision, it nonetheless allows for conviction and punishment for acts violating both theories of liability.[2] The

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[1] The "*Blockburger* test" is as follows: "[W]here the same act...constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does no." *Blockburger*, 284 U.S. at 304.

[2] Defense distinguishes this case from *Blockburger*, in part, by highlighting that material support for terrorist acts and material support for international terrorist organizations are both contained in the same sentence of the same law. *United States v. Hernandez*, 591 F.2d 1019, 1022 n.9 (5th Cir. 1979). A more relevant analysis, however, is seen in *United States v. Albrecht*, 43 M.J. 65 (1995). In that case, the U.S. Court of Appeals for the Armed Forces held that it was not multiplicious to convict the accused with

disjunctive "or" in § 950v(b)(25) reflects the separateness of the two offenses. Moreover, the Defense – bearing the burden of persuasion in this case – fails to overcome the "presumption of congressional intent to authorize cumulative punishments." *Hassoun*, 476 F.3d at 1185.

(6) Provided the Court is not persuaded by the statutory language, congressional intent can be "inferred based on the elements of the violated statutes and their relationships to each other." *United States v. Teters*, 37 M.J. at 376-77 (C.M.A. 1993). Although Khadr puts great emphasis on the pleadings by stating, "[T]hese identical acts of alleged misconduct are the sole factual basis for the Specifications," the true test requires analysis of the elements of the separate offenses. Def. Motion, D016, at 2. As stated by the Supreme Court, "the Court's application of the [*Blockburger*] test focuses on the *statutory elements* of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, nothwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli v. United States*, 420 U.S. 770, 785 n. 17 (1975). More recently, the 11th Circuit in *Hassoun* reestablished that "when comparing charges under different statutory provisions...we examine only the elements themselves; if an offense requires proof of an element that the other offense does not, we need look no further in determining that the prosecution of both offenses does not offend the Fifth Amendment." *Hassoun*, 476 F.3d at 1186. The *Hassoun* court goes on to clarify that "we need not examine the facts alleged in the indictment...nor the "practical significance" of the theories alleged for each count." *Id.* (citing *Lanier*, 920 F.2d at 894. *See also Boldin*, 772 F.2d at 726 ("[A] substantial overlap in the proof offered to establish the crimes is not a double jeopardy bar.").

(7) In this case, the distinction between the elements of the offenses is clear. Under Part IV of the Manual for Military Commissions, Crimes and Elements ("Elements"), material support is separated into two separate offenses. Material support "A" requires the accused to provide material support "to be used in preparation for, or in carrying out, an act of terrorism." Material support "B" requires the accused to provide support "to an international terrorist organization engaged in hostilities against the United States." A finder of fact could find guilt under one charging theory but not the other. The members could reach a verdict discriminating between the charges based on the different elements.

(8) For example, the language of the first element of each offense makes it clear that "A" requires support of an *act* of terror, whether consummated or not, which is separate and distinct from supporting a *terrorist organization*. The mental state requirement in both offenses differs as well. In "A", the accused has to know or intend "that the material support or resources were to be used" to support a terrorist act, whereas in "B" the accused must intend to provide material support "to such an international terrorist organization." Furthermore, in material support "B" the accused has a knowledge requirement absent from material support "A", namely that "the accused

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forgery by making false checks and forgery by uttering the same checks under the same statutory provision – UCMJ Article 123. *Albrecht*, 43 M.J. at 67.

knew that such organization has engaged or engages in terrorism." There can be no doubt that material support "A" and "B" each requires elements of proof that the other offense does not.

(9) Also, as seen in the Elements, "The elements of this offense can be met either by meeting (i) all of the elements in A, or (ii) all of the elements in B, or (iii) all of the elements in both A and B". This section of the manual could not be more clear that material support "A" and "B" require "proof of an additional fact which the other does not", and that the accused may be convicted and punished under both offenses.

(10) The Defense argues that Specifications 1 and 2 of Charge IV are a greater and lesser included offense, and, therefore, are multiplicious. Notwithstanding the "presumption of congressional intent to authorize cumulative punishments," *Hassoun*, 476 F.3d at 1185 (citations omitted), a careful reading of the elements of these offenses clearly shows that Congress did not intend for these to be one offense.

(11) At the outset, a distinction must be made from material support for terrorist *acts* ("A") and material support for a terrorist organization ("B"). The first element for "A" states that "[t]he accused provided material support or resources to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24))." Elements. As this element indicates, material support does not necessarily include carrying out an act of terrorism. Support for mere preparation of a terrorist act is sufficient. This could, hypothetically, be part of support to an international terrorist organization under "B". However, it is not necessary to be simultaneously supporting a terrorist organization "engaged in hostilities against the United States" and supporting an isolated act of terrorism. In the instant case, similar to the charges in *Hassoun*, "while these [two] charges are interrelated, they are not interdependent." *Hassoun*, 476 F.3d at 1188. *See also Albrecht*, 43 M.J. at 68 (noting that "the accused could have forged the check without uttering it and conversely he could have negotiated it without having forged the instrument.")(citing *United States v. Gibbons*, 11 U.S.C.M.A. 246, 247-48 (1960)). This proves the Defense argument that "a guilty verdict on a charge of material support to a terrorist organization necessarily includes a finding that the defendant also provided material support to terrorism" categorically false. Def. Motion, D016, at 3.

(12) The Supreme Court put it best when it stated, "The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means of dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic." *Gore v. United States*, 357 U.S. 386, 389 (1958). The Defense would have this Court rule that providing material support to an act of terrorism and providing support to a terrorist organization targeting the United States are one and the same. Both of these "social evil[s]" are "as deleterious as [they are] difficult to combat." *Gore*, 357 U.S. at 389. While the facts used to prove these offenses will overlap, the proper analysis for multiplicity rests on the elements of the offenses. As shown above, each offense requires proof of different elements. Therefore, Specification 2 of Charge IV is neither a lesser included offense, nor is it multiplicious with Specification 1.

(13) The appropriate remedy in the event of multiplicity is not dismissal. The Defense sites the discussion to RMC 907(b)(3) as a basis for defining multiplicity. They fail, however, to reference the second paragraph, which discusses the appropriate remedy if there is multiplicity. "Ordinarily, a Specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another Specification." RMC 907(b)(3) Discussion. In this case, the two Specifications under Charge IV are not multiplicious because they do not "allege the same offense, or an offense necessarily included in the other." RMC 907(b)(3) Discussion. Furthermore, dismissing Specification 2 of Charge IV is not the appropriate course of action since it does not "clearly allege the same offense, or one necessarily included" in Specification 1. RMC 907(b)(3).

b. The Government is well within its prosecutorial discretion to charge Material Support for Terrorist Acts and Material Support for an International Terrorist Organization as separate offenses, and, in any event, Unreasonable Multiplication of Charges is not a grounds for dismissal.

(1) Khadr would have this Court rule that charges of material support for terrorist acts and material support for an international terrorist organization engaged in hostilities against the United States "exaggerates his criminality." Def. Motion at 5. The Government respectfully disagrees. The two specifications do not represent an unreasonable multiplication of charges.

(2) Unreasonable multiplication of charges is a discretionary review by a military judge of the prosecution's charging decision. *United States v. Erby*, 46 M.J.649, 651-52 (A.F.C.C.A. 1997). It is a policy reflected first in Rule for Courts-Martial ("RCM") 307(c)(4), reprinted verbatim in RMC 307(c)(4). In reviewing the charges, the Military Judge has full discretion to determine whether the offenses as charged are fundamentally unfair to the accused. The Defense sites the five factors of *Quiroz* as the framework determining whether charges have been unreasonably multiplied. *Quiroz*, 55 M.J. at 338. It is worth noting, however, that the Court of Appeals for the Armed Forces additionally stated the five factors should serve only as "a guide." *Id.* at 338-39. Application of these factors, in any event, favors the Government.

(3) The second Quiroz factor[3] examines whether each of the specifications was aimed at a distinctly different criminal act. *Quiroz*, 55 M.J. at 338. Specification 1 of Charge IV involves Khadr's support of al Qaeda. Specification 2 of Charge IV involves Khadr's support to terrorist acts. While both of these crimes involve Khadr's alleged unlawful conduct in Afghanistan from June 2002 to July 27, 2002, they are separate criminal acts, unique and independent in criminality. The first is a crime against the United States in that Khadr gave himself and his efforts as material support for an international terrorist organization. The second offense is a crime against individuals, specifically the victims of the terrorist acts which he gave himself to support.

[3] The first *Quiroz* factor, whether an objection was raised at trial, is not relevant here.

(4) Furthermore, in Specification 1, the Government alleges that "The accused provided material support or resources to *al Qaeda* including, but not limited to [a list of Khadr's alleged criminal misconduct]." (emphasis added) Specification 2 provides that "The accused provided material support or resources in support of acts of terrorism including, but not limited to [a list of Khadr's alleged criminal misconduct]." (emphasis added). It is worth highlighting that the acts listed are *non-exhaustive*, and are the instances of misconduct the Government reasonably believes will prove Khadr's guilt beyond a reasonable doubt. Furthermore, it cannot be argued that these are the same transaction, as 1.) there are multiple acts under each Specification which tend to prove Khadr's criminality, and 2.) these multiple acts tend to prove two separate and distinct offenses, as illustrated above.

(5) The third *Quiroz* factor asks whether the number of charges misrepresents or exaggerates Khadr's criminality. *Quiroz*, 55 M.J. at 338. Charging Khadr with the two offenses does not exaggerate his criminality. Rather, his total criminality lies in his unlawful support of a terrorist organization *and* his unlawful support of terrorist acts. Each is a separate, repugnant, and illegal act, and each is prohibited under the MCA for separate reasons. Each offense is designed to punish a particular evil and protect a particular group of potential victims.

(6) The fourth *Quiroz* factor asks whether the number of specifications *unreasonably* increases Khadr's punitive exposure. *Id.* at 338 (Emphasis added). Each of the specifications of material support brings with it the possibility of confinement for life. These charges, however, are not an unreasonable increase in punitive exposure. The acts of terrorism that Khadr supported were responsible for the death of, at least, SFC Chistopher Speer. The international terrorist organization Khadr supported, al Qaeda, was responsible for thousands of civilian deaths. Adding the possibility of an additional life sentence seems quite reasonable when put into the context of the terrible acts and organization Khadr allegedly supported.

(7) The final *Quiroz* factor considers whether there is any evidence of prosecutorial overreaching or abuse. *Quiroz*, 55 M.J. at 338. In his motion, Khadr does not even address prosecutorial overreaching or abuse. On the contrary, the Prosecution in this case has demonstrated restraint. Not only did the Government not pursue this as a capital case for other Charges, but the alleged misconduct in Specifications 1 and 2 of Charge IV could have been further broken down into multiple specifications.

(8) It is clear that the factors in *Quiroz* favor the Government. The ultimate test is whether the charging decision was unreasonable. The Defense has failed to show that the charging decision in this case is "unreasonable." In fact, the Discussion to RCM 307 (and its predecessor), the basis for RMC 307, states "there are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses." RCM 307(c)(4) Discussion. It is within the Prosecutor's discretion to allege the facts that it reasonably believes supports a conviction

even when the underlying misconduct, as in Specifications 1 and 2 of Charge IV, overlaps.

c. Conclusion: There is no evidence of Congressional intent not to charge material support for terrorist acts separate from material support for an international terrorist organization. The elements required to prove Specification 1 are separate and distinct from those required to prove Specification 2 of Charge IV. This not only precludes Defense's argument that these offenses are multiplicious, but it also negates the claim that they are lesser and greater offenses. Furthermore, following the analysis in *Quiroz*, there is no indication of unreasonable multiplication of charges in this case. Therefore, the Government respectfully requests that the Defense motion be denied.

7. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the motion to dismiss Specification 2 of Charge IV should be readily denied. Should the Military Judge order the parties to present oral argument, the Government is prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** For Appropriate Relief (Bill of Particulars) 11 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 28 November 2007 scheduling order.

2. **Relief Sought:** The Defense moves for a Bill of Particulars with respect to Charge III. *See* R.M.C. 906(b)(5).

3. **Overview:** Charge III alleges that Mr. Khadr conspired to commit five offenses that allegedly violate the laws of war. The charge contains no information with respect to three of the objects of the conspiracy and minimal information with respect to the remaining two objects. As a result, Charge III is so vague that Mr. Khadr is unable to prepare for trial. Without more, Mr. Khadr cannot fairly deduce the nature of the charges. He therefore seeks a bill of particulars with respect to Charge III.

4. **Burdens of Proof and Persuasion:** This motion principally presents a question of law. As the moving party, the burden of persuasion is on the defense.

5. **Facts:** This motion presents a question of law. The following facts relating to the procedural history of the case are germane:

a. The President signed the MCA into law on October 17, 2006. P.L. 109-366, 120 Stat. 2600.

b. The Secretary of Defense issued the Manual for Military Commissions on or about 18 January 2007.

c. Charges were initially sworn against Mr. Khadr on 2 February 2007 and referred for trial by this Military Commission on 24 April 2007. (*See* AE 001.)

6. **Law and Argument:**

a. Rule for Military Commission 906(b)(5) permits the accused to move for a bill of particulars. The discussion section to this rule provides that:

> The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to

> plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

R.M.C. 906(b)(5); *see also United States v. Rivera*, 62 M.J. 564, 566 (C.G.Ct.Crim.App. 2005).

b. Charge III alleges that Mr. Khadr conspired to commit the offenses of (1) attacking civilians, (2) attacking civilian objects, (3) murder in violation of the law of war, (4) destruction of property in violation of the law of war and (5) terrorism. Other than naming some of the alleged co-conspirators and listing overt acts, the charge does not provide any other information about the alleged agreement.

c. The only other details provided in the charge relate to what al Qaeda allegedly did years prior to Mr. Khadr's alleged conspiracy with members and associates of al Qaeda. For example, the government alleges that Usama bin Laden founded al Qaeda in 1989 when Mr. Khadr was three years old, and that al Qaeda engaged in attacks against the American Embassies in August 1998 when Mr. Khadr was eleven years old. These allegations do nothing to enable Mr. Khadr to prepare for trial except cause the defense to guess that the government's basis for the conspiracy charge is not based on what Mr. Khadr agreed to do in the future, but on what al Qaeda did in the past, which is not a valid basis for the charge.

d. Seven overt acts are alleged, but even if the overt acts are construed in the light most favorable to the government, they are completely unrelated to three of the five objects of the conspiracy – attacking civilians, attacking civilian objects, and destruction of property in violation of the law of war. Thus, with respect to three objects, the defense is at a complete loss as to what the government alleges Mr. Khadr conspired to do. As to the others, the defense can only guess as to the nature and scope of what the government alleges Mr. Khadr agreed to do.

e. *Attacking Civilians & Civilian Objects.* With respect to the first two objects of the conspiracy, neither the charge nor discovery provided thus far indicate when, where, or how the civilians and civilian objects were to be attacked. They also fail to indicate in even a general sense who the civilians were (i.e., specific individuals or people of a particular race, religion or living in a particular location, etc.) or what the civilian objects were (i.e., specific objects, categories of objects, objects in a particular location, etc.). The discovery produced thus far does not shed any light on the alleged conspiracy with respect to attacking civilians and civilian objects.

f. *Destruction Of Property In Violation Of The Law Of War.* Like the first two objects of the conspiracy, the charge fails to notify Mr. Khadr of the nature and scope of the alleged conspiracy with respect to destruction of property in violation of the law of war. There is no indication as to the type of property at issue or where it may be located. The charge is completely silent as to the manner in which the agreed destruction of unspecified property would violate the law of war. And neither the charge nor the discovery suggest how the alleged object of destroying property in violation of the law of war differs from the alleged object of attacking civilian objects.

g. The type of property Mr. Khadr is alleged to have conspired to destroy matters, among other reasons, because not all destruction of property violates the law of war. Destruction of property only violates of the law of war, and is therefore triable by military commission,[1] if the law of war prohibits destruction of that property. *See* Norman A. Goheer, The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime, Bepress Legal Series Working Paper 1871, at 8 (Nov. 8, 2006). For example, destruction of a hospital would violate the law of war, but destruction of a tank would not. If the alleged agreement to destroy property encompasses property that is a lawful target under the law of war, Mr. Khadr would need to file a motion requesting this Commission to dismiss destruction of property in violation of the law of war as an object of the alleged conspiracy. In responding to other defense motions the government has articulated its theory that merely being an alleged unlawful enemy combatant makes otherwise lawful conduct a war crime. (*See, e.g.*, Government Response to D-008 (Motion to Dismiss Charge I).) It is not clear whether this object of the conspiracy rests on this theory. Thus, the defense is unable to assess whether such a motion is necessary or to otherwise prepare to defend against the charge at trial.

h. *Murder In Violation Of The Laws Of War & Terrorism.* The overt acts pled that arguably relate to the remaining two objects of the conspiracy – murder in violation of the law of war and terrorism – fail to provide sufficient information to enable Mr. Khadr to prepare for trial. This is because it is unknown whether the overt acts accurately suggest the scope of the alleged conspiracy with respect to these two objects or whether the alleged conspiracy is much broader. *See* Manual for Military Commission, Part IV, para. 28(c)(4) ("The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed.").

i. For example, with respect to murder, it is unclear whether the government alleges Mr. Khadr conspired to murder only Sergeant First Class Speer and two Afgan Militia Force members or whether the scope of the conspiracy extends beyond that (i.e., to combatants from a particular country or force, combatants generally, civilians or otherwise). And if civilians are encompassed in the alleged conspiracy to commit murder in violation of the law of war, there is no indication as to who they might be, even in general terms (i.e., specific individuals or people of a particular race, religion or living in a particular location, etc.) or where they might be (i.e., Khost, elsewhere in Afghanistan, outside Afghanistan, etc.). Mr. Khadr is unable to prepare for trial without knowing the basics of the government's allegation.

j. Finally, it is also unclear what the government alleges with respect to terrorism as an object of the alleged conspiracy. Construing every possible inference from the overt acts in the government's favor it is possible that the government's allegations do not go beyond alleged conduct relating to improvised explosive devices. But this is not a reasonable conclusion as preparing to defend against a military attack and engaging in combat in one's country after a military invasion hardly amounts to terrorism. Given the government's recitation of multiple terrorist attacks years before the alleged conspiracy, the government may be alleging that the

[1] At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations if expressly made triable by military commission by statute in existence at the time of the offense, or if proscribed by the international law of war. 10 U.S.C. § 821 (1998).

agreement with respect to terrorism encompassed similar acts. Neither the charge nor discovery contain information necessary to answer these basic questions.

k. As this discussion demonstrates, Charge III is so vague that Mr. Khadr is unable to prepare for trial. And the allegations are so broad that if Mr. Khadr were subject to another prosecution for conspiracy to commit the offenses alleged in Charge III, he would be unable to establish that an acquittal or conviction of conspiracy barred the subsequent prosecution. Without more, Mr. Khadr cannot fairly deduce the nature of the charges and is left to be surprised at trial as to the basic allegations he faces regarding the alleged conspiracy. Therefore, Mr. Khadr requests a bill of particulars including the following:

(1) identify any and all civilians that Mr. Khadr is alleged to have agreed to attack, including their identity (name, race and/or religion, etc.), location and the time the attacks were planned to take place;

(2) identify any and all civilian objects that Mr. Khadr is alleged to have agreed to attack, including the particular object or type of object, the location of the object and the time the attacks were planned to take place;

(3) identify the property Mr. Khadr is alleged to have agreed to destroy in violation of the laws of war, including the particular property or type of property, location of the property and time the property was planned to be destroyed, as well as the manner in which this object of the conspiracy violates the laws of war and the manner in which it differs from the alleged agreement to attack civilian objects;

(4) identify the person or persons Mr. Khadr allegedly agreed to murder, including their identity (name, race and/or religion, etc.), location and the time the murder(s) were planned to take place, as well as the manner in which the alleged murder(s) or planned murder(s) violate or would violate the laws of war;

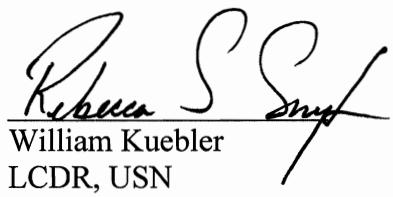
(5) identify the specific acts of terrorism in which Mr. Khadr agreed to participate and/or commit, and/or of which he had advance knowledge, the location where the acts were planned to take place (i.e., in a general area or particular location), and the time the acts were planned to occur.

7. **Oral Argument**: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for a thorough consideration of the issues.

8. **Witnesses and Evidence:** None.

9. **Certificate of Conference:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

By: 

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**D 17** **GOVERNMENT'S RESPONSE** **To the Defense's Motion for Appropriate Relief** **(Bill of particulars)** 18 January 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion for Appropriate Relief (Bill of Particulars) should be denied.

3. Overview: The Defense argues that Charge III (Conspiracy) is so vague that Mr. Khadr is unable to prepare for trial. Review of Charge III demonstrates the opposite. The sole specification of Charge III is a plain, concise, and definite statement of the essential facts constituting the offense charged; specifically, that the accused joined an ongoing conspiracy, set forth by the leadership of an international terrorist organization called al Qaeda, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States. The al Qaeda conspiracy that the accused joined encompasses attacking civilians, attacking civilian objects, committing murder in violation of the law of war, destroying property in violation of the law of war, and committing terrorism. Finally, the charge sheet alleges that the accused committed certain overt acts in furtherance of the conspiracy. The charge the accused is facing is laid out clearly in the specification and further explanation of the offense is not required.

4. Burden and Persuasion: As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions ("RMC") 905(c)(2)(B).

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation.

e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

f. In or about July 2002, the accused planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See* AE 17, attachment 4.

h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.

i. The accused and three other individuals decided not to surrender and instead "vowed to die fighting." *Id.*

j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*

k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.

l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire. *See id.*, attachment 4.

m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.

n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded "to kill U.S. forces." *Id.*, attachment 6.

o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*

p. During an interview on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a $1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

s. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:

A. THE SPECIFICATION IN CHARGE III IS SUFFICIENT

i. R.M.C. 307(c)(3) provides that "a specification is a plain, concise, and definite statement of the essential facts constituting the offense charged." A specification is sufficient if "it alleges every element of the charge offense expressly or by necessary implication.[1]

ii. American federal criminal practice is guided by the Federal Rules of Criminal Procedure. These rules state that "the indictment ... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." *Fed. R Crim P.*

[1] R.M.C. 307(c)(3). R.M.C. 307(c)(3) is copied verbatim from Rule for Court Martial 307(c)(3).

Rule 7 (c) (1). Case law has explained that the charging indictment must inform defendants of the nature and cause of the accusation to permit preparation of a defense and must equip defendants with sufficient facts to plead former jeopardy in a subsequent prosecution for the same offense. *United States v. Contris, 592 F.2d 893 (5th Cir. 1979). See also* 8 Moore's Federal Practice P 7.04 at 7-15 (rev. 2d ed. 1978).

> [The US Supreme Court] has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged,' and sufficiently apprises the defendant of what he must be prepared to meet,' and, secondly, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Russell v. United States, 369 U.S. 749 at 764 (quoting *Cochran and Sayre v. United States*, 157 U.S. 286, 290; *Rosen* v. *United States*, 161 U.S. 29, 34. *Hagner* v. *United States*, 285 U.S. 427, 431. See *Potter* v. *United States*, 155 U.S. 438, 445; *Bartell* v. *United States*, 227 U.S. 427, 431; *Berger* v. *United States*, 295 U.S. 78, 82; *United States* v. *Debrow*, 346 U.S. 374, 377-378).

iii. United States military courts follow substantially the same guideline. The test for determining the sufficiency of a charge is set out in *U.S. v. Sell*, 3 C.M.A. 202, 11 C.M.R. 202 (1953). The court in *Sell* stated,

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Sell, at 206. *See also, U.S. v. Williams*, 40 M.J. 379, 382 (C.M.A. 1994) (citing *United States v. Schwarz,* 15 M.J. 109, 111 (C.M.A. 1983); *Sell*, at 206; and *Hamling v. United States,* 418 U.S. at 117, 94 S. Ct. at 2907).

iv. In the present case, the sole specification of the Conspiracy charge is a plain, concise, and definite statement of the essential facts constituting the offense charged. The specification includes all elements of the offense; and specifically apprises the accused of what he should be prepared to meet.

v. Specifically, and as alleged in the charge sheet, at trial the government will prove beyond a reasonable doubt that the accused conspired and agreed or otherwise joined an enterprise of persons, specifically al Qaeda, an international terrorist organization, that has engaged in hostilities against the United States,

including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States. The al Qaeda conspiracy that the accused joined encompasses attacking civilians, attacking civilian objects, committing murder in violation of the law of war, destroying property in violation of the law of war, and committing terrorism. The government has alleged the accused committed overt acts in support of the al Qaeda conspiracy, including the acts listed in the charge sheet.

vi. Finally, the Defense could not argue that they do not possess sufficient facts to plead former jeopardy in a prosecution for the same offense. In addition to the detailed allegations contained in the charge sheet, the government has provided the Defense over 15,000 pages of discovery materials and a list of all witnesses we intend to call at trial. Included in the discovery materials are numerous statements made by the accused, detailing his knowledge regarding the al Qaeda conspiracy and the specific acts he took in furtherance of the conspiracy. The discovery materials include all of the evidence the government will present at trial to prove the allegations in Charge III.

B. THE REQUESTS FOR A BILL OF PARTICULARS SHOULD BE DENIED.

i. The Defense claims that the accused cannot fairly deduce the nature of the charges and is left to be surprised at trial as to the basic allegations he faces regarding the alleged conspiracy.[2] As stated previously, the charges, as well as the discovery provided by the government, clearly provide sufficient notice to the accused regarding the nature of the allegations he is facing. A bill of particulars is not required under these circumstances.

ii. In American law, "a bill of particulars is not a matter of right." 1 Charles Alan Wright, Federal Practice and Procedure § 129, at 648 (3d ed. 1999) (citations omitted). The decision to order a requested bill of particulars is a decision that rests within the sole discretion the court. See *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (citing United States v. Barnes, 158 F.3d 662, 665-66 (2d Cir. 1998)). In deciding whether a bill of particulars is needed, the standard that the court must apply is "*whether the information sought has been provided elsewhere, such as in other items provided by discovery,* responses made to requests for particulars, prior proceedings, and the indictment itself." *United States v. Strawberry, 892 F. Supp. 519, 526 (1995)* (emphasis added) (citing *United States v. Feola*, 651 F. Supp. 1068,1133).

iii. US courts have specifically noted that the proper scope and function of a bill of particulars is not to obtain disclosure of evidence or witnesses to be offered by the Government at trial, but to minimize surprise, to enable an accused to obtain such ultimate facts as are needed to prepare his defense, and to permit a defendant successfully to plead double jeopardy if he should be prosecuted later for the same offense. See

[2] See D-17 at p. 4.

United States v. Salazar,, 415 U.S. 985, 94 S. Ct. 1579, 39 L. Ed. 2d 882 (1974). A bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused. See *United States v. Ramirez*, 602 F. Supp. 783 (S.D.N.Y. 1985). Thus, courts have refused to treat a bill of particulars as a general investigative tool for the defense, or as a device to compel disclosure of the Government's evidence or its legal theory prior to trial. See *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974).

iv. Specifically addressing requests for a bill of particulars in conspiracy cases, U.S. Courts have opined that a motion for bill of particulars as to precisely when, where, and with whom a conspiracy agreement was formed, detailed facts, and precise parts which defendant and his alleged co-conspirators played in forming and executing the conspiracy should be denied because the information sought by defendant was evidentiary in nature and that it is not function of bill of particulars to provide detailed disclosure of the government's evidence in advance of trial. *Wong Tai v. United States*, 273 U.S. 77, 82, 47 S. Ct. 300, 71 L. Ed. 545 (1927); *Overton v. United States*, 403 F.2d 444, 446 (5th Cir. 1968); *United States v. Rosenfeld*, 264 F. Supp. 760, 762 (N.D.Ill.1967); *United States v. Trownsell*, 117 F. Supp. 24, 26 (N.D.Ill.1953); *United States v. Bozza*, 234 F. Supp. 15, 16-17 (E.D.N.Y.1964); *United States v. Gilboy*, 160 F. Supp. 442, 456 (M.D.Pa.1958). *United States v Cullen* 305 F Supp 695, (E.D. Wis. 1969).

v. U.S. military courts take the same view. In *U.S. v. Williams,* the Court of Military Appeals held:

> The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.
>
> A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.

Williams, 40 M.J. at 381.[3]

vi. In its request, the Defense asks for a bill of particulars addressing the following specific items (the government point-by-point response to these requests follows in italics in the subparagraphs below):

[3] The standard in Williams is the identical standard included in the comment to R.C.M. 906(b)(6) and R.M.C. 906(b)(5).

1. Identify any and all civilians that the accused is alleged to have agreed to attack, including their identity (name, race and/or religion, etc.), location and the time the attacks were planned to take place;

   As alleged, the accused is charged with conspiring to commit the offense of attacking civilians by joining a group of individuals whose common criminal enterprise set forth a plan to attack citizens of the United States. The specification, overt acts and discovery that has been provided are more than sufficient to put the Defense on notice of the particulars of this charge.

2. Identify any and all civilian objects that the accused is alleged to have agreed to attack, including the particular object or type of object, the location of the object and the time the attacks were planned to take place;

   As alleged, the accused is charged with conspiring to commit the offense of attacking civilian objects by joining a group of individuals whose common criminal enterprise set forth a plan to attack civilian objects. The specification, overt acts and discovery that has been provided are more than sufficient to put the Defense on notice of the particulars of this charge.

3. Identify the property the accused is alleged to have agreed to destroy in violation of the laws of war, including the particular property or type of property, location of the property and time the property was planned to be destroyed, as well as the manner in which this object of the conspiracy violates the law of war and the manner in which it differs from the alleged agreement to attack civilian objects;

   As alleged, the accused is charged with conspiring to commit the offense of destruction of property by an unprivileged belligerent by joining a group of individuals whose common criminal enterprise set forth a plan to destroy property of the United States. The conspiracy charge, overt acts and discovery provided are more than sufficient to put the Defense on notice of the particulars of this charge.

4. Identify the person or persons the accused allegedly agreed to murder, including their identity (name race and/or religion, etc.), location and the time the murders were planned to take place, as well as the manner in which the alleged murder(s) or planned murder(s) violate or would violate the laws of war;

   As alleged, the accused is charged with conspiring to commit the offense of murder in violation of the law of war by joining a group of individuals whose common criminal enterprise set forth a plan to attack soldiers and civilians of the United States wherever they could find them. The conspiracy charge, overt acts and discovery that have been provided are more than sufficient to put the Defense on notice of the particulars of this charge.

5. Identify the specific acts of terrorism in which the accused agreed to participate and/or commit, and/or of which he had advance knowledge, the location where the acts were planned to take place (i.e., in a general area or particular location), and the time the acts were planned to occur.

As alleged, the accused is charged with conspiring to commit the offense of terrorism by joining a group of individuals whose common criminal enterprise set forth a plan to terrorize the United States Government and its citizens in response to the United States' continued presence in Saudi Arabia and for its support of Israel. The conspiracy charge, overt acts and discovery provided are more than sufficient to put the Defense on notice of the particulars of this charge.

6. In each request above the Defense requests the precise date, time, and location of the offenses committed.

Courts have ruled directly on the issues that the Defense raises. With regard to desiring a particular date, "[c]ourts have consistently held that unless the date is an essential element of the offense, an exact date need not be alleged." See United States v. Williams, 40 M.J. 379, 382 (C.M.A. 1994). Thus, because the date is not an essential element of conspiracy under Commission Law, the Defense is not entitled to a bill of particulars furnishing a precise date on which the offenses occurred.

In regard to the time and location, it is the Government's position that the specification, overt acts and discovery provided are more than sufficient to put the Defense on notice of the particulars of the time and location.

vii. Additionally, the Defense has been provided with over 15,000 pages of discovery. Some of the documents provided are digital media, including video, audio, and CD ROMs containing multiple pages of documents. As such, there is no surprise awaiting the defense as to the timeframes, locations, and persons related to the accused regarding the crimes in which he is charged. Additionally, the Prosecution has given the Defense all statements which the accused has made. These statements, along with the other evidence provided, provide the defense with more than adequate information necessary to prepare a defense clear of surprise at trial.

viii. The accused is clearly on notice regarding the nature of the charges he is facing and no further explanation is required. The Defense's request for a bill of particulars is unwarranted and therefore should be denied.

7. Oral Argument: The Government disagrees that oral argument is necessary to resolve this motion. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** for Appropriate Relief (Strike Terrorism from Charge III) 11 December 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 28 November 2007 scheduling order.

2. **Relief Requested:** Mr. Khadr moves to strike "terrorism" as an object of the conspiracy alleged in Charge III.

3. **Overview:**

a. The terrorism as an object of the conspiracy alleged in Charge III must be struck because the Military Commission has no jurisdiction to try Mr. Khadr for conspiracy to commit terrorism. The MCA requires the object of the conspiracy to be an offense subject to trial by military commission. At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations established by statute or by the law of war. At that time, neither U.S. law nor the law of war made terrorism an offense triable by military commission: the Uniform Code of Military Justice (UCMJ) set forth the applicable U.S. law at the time, and it does not identify terrorism as a crime triable by military commission. Likewise, the law of war does not proscribe terrorism. Treaties and international practice confirm that terrorism does not violate the law of war. Thus, conspiracy to commit terrorism cannot be tried by military commission.

b. Although the MCA identifies terrorism as an offense triable by military commission, that fact is wholly irrelevant to this case, because both U.S. and international law provide that individuals must be tried under the law as it existed at the time of their alleged offense. This constitutional prohibition on *ex post facto* legislation recognizes that there is a fundamental unfairness in holding individuals accountable for consequences that they could not have foreseen at the time of their alleged conduct. Mr. Khadr could not have foreseen in 2002 that the offense of conspiracy to commit terrorism would be triable by military commission four years later, nor foreseen the significantly different consequences that would result from that fact. Moreover, the prohibition on *ex post facto* legislation is a restraint on Congress as opposed to an individual right. To avoid this constitutional problem, MCA § 950v(b)(25) should be interpreted to apply prospectively only.

c. Accordingly, because Mr. Khadr must be tried based upon the law at the time the alleged offense occurred, and because at that time, terrorism was not one of the narrow category of crimes triable by military commission, this Military Commission lacks jurisdiction to try Mr. Khadr for conspiracy to commit terrorism. Therefore, this Commission should strike terrorism as an object of the conspiracy alleged in Charge III.

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. **Facts:** This motion presents a question of law. However, the following facts, which are a matter of record in these proceedings, are germane to the Commission's disposition of the instant motion.

a. The President signed the MCA into law on October 17, 2006. P.L. 109-366, 120 Stat. 2600.

b. The government preferred charges against Mr. Khadr under the MCA on 2 February 2007. *See* Sworn Charge Sheet (2 Feb 2007) [hereinafter Sworn Charges]. Charges were re-preferred, with amendments, on 5 April 2007. These amended charges were referred to this Military Commission on 24 April 2007. *See* Charge Sheet (24 Apr 2007) [hereinafter Charge Sheet].

c. The Government alleges that Mr. Khadr conspired to commit terrorism in June and July of 2002. *See* Charge Sheet. The government has alleged that Mr. Khadr committed these offenses at the age of 15. *See* Sworn Charges.

d. Mr. Khadr is not alleged to have committed any acts forming the basis for the instant prosecution occurring after the date of the MCA's enactment. *See* Charge Sheet.

6. **Argument: Terrorism Must Be Dismissed As An Object Of The Alleged Conspiracy Because Terrorism Is Not An Offense Triable By Military Commission**

a. The Object of the Conspiracy Must Be An Offense Triable By Military Commission

(1) Assuming for the purpose of this motion that conspiracy is an offense triable by military commission,[1] for the charge to state an offense, the object of the alleged conspiracy must be a "substantive offense[] triable by military commission." MCA § 950v(b)(28). The government has alleged "terrorism" as one of the objects of the alleged conspiracy. (*See* Charge Sheet.) As discussed below, "terrorism" is not triable by military commission. Thus, it is not a valid object of conspiracy. Accordingly, this Commission does not have jurisdiction to try Mr. Khadr for conspiracy to commit terrorism.

b. Terrorism Was Not An Offense Triable By Military Commission At The Time Of The Alleged Conduct

(1) As the Supreme Court made clear in *Ex Parte Quirin*, the first question in a military commission case is "whether any of the acts charged is an offense against the law of war

[1] The defense raises this motion in the alternative to its motion to dismiss Charge III for lack of subject matter jurisdiction (D-010) filed on 7 December 2007.

cognizable before a military tribunal." 317 U.S. 1, 29 (1942).[2] At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations if expressly made triable by military commission, or if proscribed by the international law of war. 10 U.S.C. § 821 (1998). Because terrorism charge does not fall into either category, this Commission has no jurisdiction try Mr. Khadr for conspiracy to commit terrorism. And while the MCA purports to make terrorism an offense triable by military commission, this provision of the MCA cannot be applied to Mr. Khadr because the MCA was not enacted until more than four years *after* the charged conduct. Thus, its application in this case would violate the prohibition on *ex post facto* legislation under both U.S. and international law.

(2) Neither U.S. nor international law defined terrorism as an offense triable by military commission at the time the charged offense in this case was allegedly committed. The statute applicable at that time—the Uniform Code of Military Justice (UCMJ)—made only two offenses triable by military commission, and terrorism was not one of them.[3]

(3) Because there is no statutory basis to try Mr. Khadr before a military commission for conspiracy to commit terrorism, the only possible basis for this Commission's jurisdiction is if terrorism plainly and unambiguously violates the law of war. *Hamdan*, 126 S. Ct. at 2780 (plurality) ("When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.") (citing *Quirin* 317 U.S. at 30). In order to justify a trial on that basis, however, the Government must "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Id.* at 2780. For an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally." *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also, e.g.*, *The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."). As with the conspiracy offense at issue in *Hamdan*, "[t]hat burden is far from satisfied here." *Id.*

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[2] *See also Hamdan*, 126 S. Ct. at 2777 ("[A] law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (citing W. Winthrop, Military Law and Precedents 839 (rev. 2d ed. 1920)); *id.* (noting that it "is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge 'properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*'" (citing Winthrop at 842 (emphasis in original)); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war.").

[3] The only UCMJ offenses triable by military commission are aiding the enemy and spying. *See* Art. 104, UCMJ, 10 U.S.C. § 904; Art. 106, UCMJ, 10 U.S.C.§ 906. The latter offense possesses more elements than the spying offense with which Mr. Khadr was charged—including at least three elements that cannot be satisfied in Mr. Khadr's case. *See* Art. 104, UCMJ, 10 U.S.C. § 904; Art. 106, UCMJ, 10 U.S.C. § 906.

(4) Like a plurality of this Court found in *Hamdan* with respect to conspiracy, the offense of terrorism does not "appear either in the Geneva Conventions or the Hague Conventions – the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781. Furthermore, there is not even international consensus on the definition of terrorism - is a position that the United States has repeatedly asserted in the global legal community. For example, in 1991, when the United Nations Secretary-General sought Member States' views on the possibility of convening an international conference to define terrorism, the U.S. did not support such a conference on the basis that it would not be useful as it would seek to "address a question on which there is little possibility of achieving consensus."[4] It noted that since "the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, the international community has repeatedly failed in its efforts to reach consensus on a generic definition of terrorism."[5] Then in 1996, the U.S. Mission to the United Nations supported the decision of the International Law Commission to exclude "international terrorism" from the list of crimes contained in the Draft Code of Crimes Against the Peace and Security of Mankind.[6] At the drafting of the Rome Statute for the International Criminal Court,[7] the U.S. was strongly opposed to the inclusion of "terrorism" amongst the list of international crimes over which the Court would have jurisdiction. The final draft of the Statute, which has 139 signatory nations,[8] "provides the most comprehensive, definitive and authoritative list of war crimes,"[9] yet it does not list "terrorism" as a violation of the law of war. Finally, the in April 2004, the U.S. State Department reiterated this lack of an accepted definition of terrorism in its report on the "Patterns of Global Terrorism." It reported, "[n]o one definition of terrorism has gained universal acceptance."[10]

(5) Instead, "terrorism" remains a descriptive term, which encompasses a wide range of precise substantive offenses, such as hijacking and taking of hostages, rather than a

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[4] *See* "Submission, U.S. Permanent Representative to the United Nations, to UN Secretary General Regarding International Terrorism," April 15, 1991 *available at* http://www.state.gov/s/l/65586.htm.

[5] *Id.*

[6] *See* United States Mission to the United Nations, *Report of the International Law Commission: The Draft Code of Crimes: Statement by John R. Crook, Office of the Legal Advisor, Department of State*, Nov. 5, 1996 at 2.

[7] S*ee generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Crimes and Elements portion of which was drafted largely by the United States. David J. Scheffer, "The Global Challenge of Establishing Accountability for Crimes Against Humanity" Remarks, Centre for Human Rights, University of Pretoria, Pretoria, South Africa, Aug. 22, 2000 *available at* http://www.state.gov/documents/organization/6551.doc ("T]he United States led the UN negotiations for Elements of Crimes of the International Criminal Court. We drafted the primary document and for nearly 2 years we were in the trenches with South Africa and other governments to finish this work-engine document of the Court.").

[8] World Signatures and Ratifications, http://www.iccnow.org/?mod=romesignatures.

[9] Robert Cryer, *International Criminal Law v. State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 990 (2005).

[10] U.S. State Department, Patterns of Global Terrorism: 2003 (April 2004).

substantive offense itself. A perfect analogy is "white collar crime", which describes a particular class of offenses (such a securities fraud), but is not a substantive offense in and of itself.

(6) United States practice is consistent with the proposition that "terrorism" is not a law of war offense. The federal criminal statute punishing "war crimes" omitted (and continues to omit) "terrorism" as an offense punishable under that section. *See* 18 U.S.C. § 2441 (2007). And the most broadly defined terrorism offense in the United States – "acts of terrorism transcending national boundaries", 18 U.S.C. § 2332b, which does not encompass Mr. Khadr's conduct – was punishable exclusively, as a civilian criminal offense.

(7) Therefore, while there may exist a "handful of crimes to which the law of nations attributes individual responsibility,"[11] terrorism is not one of them.[12] The "handful" is reserved for those crimes that are particularly egregious in nature and for conduct that violates "well-established, universally recognized norms of international law".[13] When "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous."[14] Here, there is no plain and unambiguous precedent demonstrating that terrorism, as such, is a war crime. Because there continues to be international disagreement on the definition of terrorism, the government cannot carry its "minimum" burden of making "a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan*, 126 S. Ct. at 2780 (plurality). Therefore, this Commission has no jurisdiction to consider whether Mr. Khadr conspired to commit terrorism. Terrorism must be struck as an object of the alleged conspiracy.

c. The MCA Cannot Provide Jurisdiction Over Mr. Khadr Because It Was Not Enacted Until Four Years After the Charged Conduct

(1) <u>The MCA Should Not Be Interpreted To Apply Retroactively</u>

(a) As previously discussed, neither U.S. law nor the international "law of war" recognized terrorism as one of the narrow category of crimes triable by military commission at the time of Mr. Khadr's alleged offenses. *See supra* at 2-5. Indeed, the Government has implicitly conceded this point by charging Mr. Khadr with conspiracy to commit terrorism under the MCA, rather than under any statute in effect at the time of the alleged offense. But the MCA's conferral of jurisdiction on the military commission to try conspiracy to commit terrorism in 2006 is irrelevant to this case because the MCA was not enacted until four years *after* Khadr allegedly committed the offenses with which he is charged.

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[11] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. 1984) (Edwards, Circuit Judge, concurring). These offenses include war crimes, crimes against humanity, and genocide.

[12] *Id*. (Edwards, Circuit Judge, concurring) (finding that torture, absent state action, and terrorism generally are not violations of the law of nations).

[13] *See Kadic v. Karadzic*, 70 F.3d 232, 243 (C.A.2 (N.Y.), 1995).

[14] *See Hamdan*, 126 S.Ct. at 2780 (plurality).

(b) It is well-established that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Here, Congress did not provide that the provisions of the MCA under which Mr. Khadr is charged should be applied retroactively. To the contrary, Congress made explicit that only one specific section of the MCA—its implementation of treaty obligations—should be applied retroactively. *See* Military Commissions Act, Pub. L. No. 109-366,§ 6(b)(2), 120 Stat. 2600, 2633 (2006) (amending 18 U.S.C. § 2441).

(c) Section 950p provides additional evidence that Congress did not intend the MCA to apply retroactively because it makes clear that Congress believed that the MCA "does not establish new crimes that did not exist before its enactment." 10 U.S.C. § 950p. While Congress's belief in this regard was erroneous— conspiracy to commit terrorism was not an offense triable in a military commission before the MCA's enactment—this erroneous belief nonetheless suggests that Congress did not intend to change existing law when it enacted the MCA.[15] It follows *a fortiori* that it would not have intended any inadvertent change in the law to apply retroactively—particularly in light of the general presumption against retroactive legislation, *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and the fact that retroactive application of such a change would raise serious constitutional questions under the *Ex Post Facto* Clause, as is discussed below.

(d) Section 948d(a) of the MCA is not to the contrary. That provision states that the commission has jurisdiction over "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." 10 U.S.C. § 948d(a). The best reading of this provision—and one which renders it consistent with section 950p—is that it simply clarifies that the commission's jurisdiction extends even to offenses that occurred prior to the commission's establishment by the MCA. To the extent that the MCA (contrary to its stated purpose) sets forth new offenses that are not also violations of the law of war, such offenses are not "made punishable by this chapter" if they occurred before enactment of the MCA, because under section 950p and the presumption against retroactivity, the MCA's substantive criminal provisions do not apply retroactively.

(e) Even if Section 948d(a) is read—in conflict with section 950p and the presumption against retroactivity—to suggest that the MCA was intended to apply retroactively, it would at best render the statute ambiguous. And any doubts about whether the MCA applies

[15] To read § 950p as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to adoption of the M.C.A. violates bedrock separation of powers principle. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") This interpretation should be avoided because it would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

to conduct prior to the law's passage should be resolved in favor of non-retroactivity, because a contrary holding would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

(f) In this case, applying the MCA retroactively would violate the *Ex Post Facto* Clause of the U.S. Constitution. This rule of statutory construction is especially weighty in this case because, as discussed below, international law also prohibits the application of *ex post facto* laws, and the *Charming Betsy* doctrine compels U.S. courts to interpret statutes in accordance with international law whenever possible. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Interpreting the MCA in accordance with its own plain text, which identifies the statute as "declarative" rather that retroactive, § 950p, avoids these problems of constitutionality and comity, and is the better reading of the statute.

(2) Applying The MCA Retroactively Would Violate Constitutional And International Prohibitions On Ex Post Facto Laws

(a) Even assuming, *arguendo*, that Congress intended the MCA to apply retroactively, the MCA nonetheless cannot be so applied in this case because doing so would violate the *Ex Post Facto* Clause of the U.S. Constitution. The U.S. Constitution's prohibition on legislation that retroactively "alter[s] the definition of crimes or increase[s] the punishment for criminal acts" is clear and unequivocal. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990); *see* also U.S. Const. art. I, § 9, cl.3 ("No . . . ex post facto Law shall be passed."); *Kring v. Missouri*, 107 U.S. 221, 227 (1882) (noting that the Convention attached "[s]o much importance" to the ex post facto prohibition "that it is found twice in the Constitution").[16] It is well-established that this "constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to . . . aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *see also Collins*, 497 U.S. at 43. The *Ex Post Facto* Clause thus ensures that an individual can know the consequences of his actions when he commits them. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the *Ex Post Facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."). Here, Mr. Khadr could not have anticipated that the conduct he is alleged to have committed in 2002 would subject him to prosecution by a military commission in 2006.

[16] The prohibition also appears as a limitation on the power of state legislatures. U.S. Const. art. I, § 10, cl.1 ("No State shall . . . pass any . . . ex post facto Law.").

(b) Applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause for two simple reasons. First, it retroactively changes the "criminal quality attributable to an act." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). Second, it alters the "nature or amount of the punishment imposed for its commission." *Id.*

(3) Terrorism, As Defined By The MCA, Was Not A Crime Under Federal Law At The Time Of The Alleged Offense

(a) First, applying the MCA to Mr. Khadr would violate the *Ex Post Facto* Clause because it changed the "criminal quality attributable to" Mr. Khadr's alleged conduct by making terrorism an offense triable by military commission. It is well-established that Congress is without power to make an action that "was innocent when done before the passing of the law . . . , criminal, and punish[ ] such action." *Calder v. Bull*, 3 U.S. 386, 390-91 (1798); *see also Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Congress cannot retroactively change the "criminal quality attributable to an act"); *see also Collins*, 497 U.S. at 43. The *Ex Post Facto* Clause of the Constitution restricts congressional power by "confining the legislature to penal decisions with prospective effect." *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981).

(b) Furthermore, the Court has consistently stressed the "'lack of fair notice'" of the illegality of one's action as one of the "'central concerns of the Ex Post Facto Clause.'" *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 30); *see also Strogner v. California*, 539 U.S. 607, 611 (2003). The *Ex Post Facto* Clause thus ensures that an individual can know the consequences of his actions when he commits them. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the *Ex Post Facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."). At the time that Mr. Khadr is alleged to have committed the offense of conspiring to commit terrorism, terrorism as defined by the MCA was not illegal. Consequently, Mr. Khadr could not have anticipated that the conduct he is alleged to have committed in 2002 would subject him to prosecution by a military commission in 2006 or a United States court of any variety. Applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause because it makes an act that was innocent when done, criminal, and punishes that act.

(c) In short, because the Constitution expressly withholds from Congress the power to enact *ex post facto* legislation, the MCA offense of terrorism is without effect as applied to Mr. Khadr. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."). Thus, this Commission should strike terrorism as an object of the alleged conspiracy.

(4) Even If Mr. Khadr's Alleged Acts Did Violate Existing Federal Law, Punishment By Military Commission Would Violate The *Ex Post Facto* Clause

(a) Moreover, even if U.S. law previously criminalized Mr. Khadr's actions as conspiring to commit terrorism – and the defense is not aware of any applicable U.S. law that

Mr. Khadr's actions would violate – punishment by this Military Commission under the MCA would nonetheless violate the Ex Post Facto Clause. What is material is that the law before the MCA did not recognize terrorism as one of the few crimes *triable by a military commission*. As a result of that change, Mr. Khadr faces prosecution before an entirely different adjudicative body with entirely different rules than would have been the case had he been tried in federal court. While "statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited," *Beazell*, 269 U.S. at 170, conferring jurisdiction on an entirely different body with entirely different rules of procedure is another matter altogether. In particular, because he faces trial before a commission rather than a court, Mr. Khadr will be (1) unable to receive the protections of the Juvenile Delinquency Act (the "JDA"), 18 U.S.C. §§ 5031 *et seq.*; (2) subject to adjudication absent procedural protections such as the right to a grand jury indictment, the right to the protections of the Federal Rules of Evidence, and the right to trial before a jury of his peers who, before conviction, would have to agree unanimously that the evidence proved his guilt beyond reasonable doubt.

(b) As a preliminary matter, if Mr. Khadr were tried in federal court, he would have the right to invoke the protections of the JDA because he was just 15 years old when his alleged offenses occurred. Under the JDA, Mr. Khadr could be tried as an adult only if a court, after making factual findings about several factors such as his age, social background, and psychological maturity, determined that such a trial was appropriate. *Id.* § 5032. If the MCA is applied to Mr. Khadr, he will be deprived of the JDA's protections because the MCA simply assumes, that all persons, even those who have not yet attained legal or psychological maturity under U.S. law, should be subject to the same procedures and consequences. *Cf. Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that juveniles' "lack of maturity and an underdeveloped sense of responsibility," combined with their greater "susceptib[ility] to negative influences and outside pressures . . . render suspect any conclusion that a juvenile falls among the worst offenders").

(c) Further, applying the MCA to Mr. Khadr would subject him to a method of adjudication qualitatively different from a criminal trial in a domestic court. *Cf. Beazell*, 269 U.S. at 171 ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . ."). Perhaps most significantly, if Mr. Khadr had been tried for conspiracy to commit terrorism in federal court, he could be convicted only if a jury of his peers unanimously found him guilty of the offense. *See* Fed. R. Crim. P. 31(a); *see also* U.S. Const. amend. VI. Under the MCA, by contrast, all that is required to convict the accused of "terrorism" is "concurrence of two-thirds of the [military commission] members present at the time the vote is taken." *See id.* § 949m(a). In addition, under the MCA, the accused has no right to grand jury indictment, *see* 10 U.S.C. § 948q(a), and the protections against the admission of unreliable evidence afforded by the Federal Rules of Evidence are significantly limited, *see id.* § 949a. Thus, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "changes the criminal quality attributable to an act" by making it one subject to trial by military commission.

(d) Second, applying the MCA to Mr. Khadr also violates the *Ex Post Facto* Clause because it deprives him of the protections against arbitrary sentencing provided by federal sentencing law. *See Rita v. United States*, 127 S. Ct. 2456, 2463 (2007). Under federal law, courts are required to consider a number of different factors, including the "nature and circumstances of the offense and the history and characteristics of the defendant," to ensure that the sentence imposed is "no greater than necessary." 18 U.S.C. § 3553; *see, e.g., United States v. Fonseca*, 473 F.3d 1109, 1112 (10th Cir. 2007) (requiring courts to consider the recommendations of the Federal Sentencing Guidelines, including consideration of any applicable grounds for reductions in the otherwise recommended range). Under the MCA, by contrast, any person convicted of conspiracy to commit terrorism "shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct." 10 U.S.C. § 950v(d)(28). The MCA thus vests nearly unbridled discretion in the military commission to make the determination as to what sentence is appropriate in any given case, and the military commission is under no obligation analogous to that of federal courts to consider possible grounds, unique to Mr. Khadr's case, which might warrant a reduced sentence.

(e) In addition, and perhaps most significantly, in the federal system, Mr. Khadr would be unquestionably entitled to appellate review of both the procedural and substantive reasonableness of any sentence imposed by the district court. *See, e.g., United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006). By contrast, the Government will likely argue that Mr. Khadr does not have the right to appeal whatever sentence is ultimately imposed by the military commission.[17] Thus, applying the MCA to Mr. Khadr deprives him of the certain right to appellate review of his sentence he would have enjoyed under the preexisting law.

(f) These changes in the applicable sentencing regime are a clear violation of the *Ex Post Facto* Clause. In *Miller v. Florida*, the Supreme Court held that a change in sentencing laws could violate the *Ex Post Facto* Clause, and it was immaterial that the new law did not "'technically . . . increase . . . the punishment annexed to [the defendant's] crime.'" *Miller v. Florida*, 482 U.S. 423, 432-33 (1987) (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)). The Court explained that the new law violated the *Ex Post Facto* Clause because under the new law "the trial judge did not have to provide any reasons, convincing or otherwise, for imposing the sentence, and his decision was unreviewable." *Id.* at 432-33. And while the Supreme Court has approved new statutes that "altered the methods employed in determining whether the death penalty was to be imposed" in a way that was "ameliorative" and provided "significantly more safeguards to the defendant than did the old," *Dobbert v. Florida*, 432 U.S. 282, 293, 294, 295 (1977), it has reached the opposite conclusion when—as in the case of the MCA—the new legislation does not heighten the protections available to the defendant. *See Miller*, 482 U.S. at 431-32 ("Unlike *Dobbert*, where we found that the 'totality of the procedural changes wrought by the new statute . . . did not work an onerous application of an *ex post facto* change,' here [defendant] has not been able to identify any feature of the revised guidelines law

[17] The MCA limits the jurisdiction of the Court of Appeals is "limited to the consideration of . . . (1) whether the final decision was consistent with the standards and procedures specified in [the MCA]; and . . . to the extent applicable, the Constitution and the laws of the United States." 10 U.S.C. § 950g.

that could be considered ameliorative.") (internal citation omitted). Moreover, the changes wrought by the MCA are not simply procedural; they deprive Mr. Khadr of the right to have his sentencing body consider mitigating factors that might warrant a reduction in his sentence and, even more fundamentally, they may deprive him of the uncontestable right to have that sentence reviewed by a higher court. Applying the MCA to Mr. Khadr thus changes the "nature and amount" of his punishment within the meaning of the *Ex Post Facto* Clause's prohibition, and the MCA therefore cannot serve as the basis for military commission jurisdiction over Mr. Khadr.

(g) And if courts-martial provide the appropriate benchmark, *see Hamdan*, 126 S. Ct. at 2791 (holding UMCJ requires courts-martial rules be applied to military commissions unless impracticable), applying the MCA to Mr. Khadr nonetheless violates the *Ex Post Facto* Clause. This Commission need look no further than the text of the MCA itself, which *explicitly* breaks from *court-martial* procedures. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The other rules "shall apply to trial by military commission *only to the extent provided by this chapter*." *Id.* § 948b(d)(2) (emphasis added). This is little comfort, since the MCA provides, among other things, that *court-martial* principles of law and rules of evidence shall apply only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). The very same section of the MCA notes that the Secretary may prescribe that under certain circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. While the Government lists in its response a number of purported rights available to Mr. Khadr under the military commission system,[18] the relevant question is not what rights the MCA provides, but what rights it takes away. As discussed above and in detail in Mr. Khadr's motion to dismiss, the retroactive application of the MCA to Mr. Khadr's case deprives him of many rights which are routinely provided in U.S. courts and courts-martial. (Def. Motion at 10-13.)

(h) Thus, regardless of whether the appropriate benchmark is trial in an Article III court or by court-martial, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "aggravate[s]" the consequences for the conduct Mr. Khadr is alleged to have committed. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925).

[18] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do in practice. For example, the Government states the accused has the right to cross-examine witnesses who testify against him, but because the Government can base its case exclusively on documentary and hearsay evidence, the accused may have no witnesses and/or no witnesses with personal knowledge to cross-examine. *See* 10 U.S.C. § 949a(b)(2). The Government also claims that the accused has the right to present evidence in his defense, but the accused cannot compel the attendance of witnesses at a commission in Guantanamo Bay.

(i) In addition to violating the express terms of the U.S. Constitution, interpreting the MCA to apply retroactively would conflict with international law. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Like U.S. law, international law – including the law of war,[19] international criminal law,[20] and human rights law,[21] – also prohibits the application of *ex post facto* laws. For example, Article 22 of the Rome Statute of the International Criminal Court provides that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*."[22] The MCA, however, purports to do exactly what the Rome Statute prohibits: allow the military commission to hold individuals criminally responsible for conduct which, at the time it took place, was not a "crime within the jurisdiction of the Court." International law also clearly prohibits the imposition of heavier sentences than were applicable when the offense was committed.[23] Thus, international law, too, prohibits the *ex post facto* application of the MCA to this case.

(j) Because applying the MCA to Mr. Khadr would violate the *Ex Post Facto* Clause, he cannot be tried for any charges brought under it, including conspiracy to commit terrorism. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").

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[19] Protocol I, art. 75(4)(c) ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications); Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 99(1), 75 U.N.T.S. 135; Geneva Convention IV, art. 67.

[20] *See* Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

[21] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 9 (entered into force July 18, 1978; International Covenant on Civil and Political Rights (1966), art. 15(1), 999 U.N.T.S. 171 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); Universal Declaration of Human Rights, art. 11(2), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."); *see also* Executive Order 13107, "Implementation of Human Rights Treaties," Dec. 10, 1998 ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.").

[22] Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (emphasis added).

[23] *See, e.g.*, International Covenant on Civil and Political Rights art. 15(1) (entered into force Mar. 23, 1976); Protocol I of the Geneva Conventions art. 75(4)(c) (entered into force Dec. 7, 1979).

d. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized terrorism as one of the narrow category of crimes triable by military commission at the time the charged conduct in this case is alleged to have occurred. The MCA requires the object of the conspiracy to be an offense subject to trial by military commission. And since terrorism is not an offense subject to trial by military commission, conspiracy to commit terrorism was also not an offense subject to trial by military commission at the time of the alleged conduct. Because both U.S. and international law recognize that an individual must be tried according to the law in effect at the time of his alleged offense, the MCA, which was not enacted until four years *after* the charged conduct in this case, cannot serve as a basis for jurisdiction over Mr. Khadr. Accordingly, the military commission does not have jurisdiction to consider a charge of conspiracy to commit terrorism. Therefore, this Commission should strike terrorism as an object of the conspiracy alleged in Charge III.

7. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h). Oral argument will allow for thorough consideration of the issues raised by this motion and assist the Court in understanding and resolving the complex legal issues presented.

8. **Witnesses and Evidence:** Mr. Khadr intends to offer the testimony of William Fenrick to testify on issues relating to the international law of war consistent with R.M.C. 201A(b).

9. **Certificate of Conference:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. **Attachment:**

A. Sworn Charge Sheet (2 Feb 2007)

/s/
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

_____
(day) (month) (year)

MEMORANDUM FOR Detainee Omar Ahmed Khadr 0766, Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the ____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

MURDER IN VIOLATION OF THE LAW OF WAR

ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CONSPIRACY

PROVIDING MATERIAL SUPPORT FOR TERRORISM

SPYING

(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this ____ day of _____, 2007.

_____	_____
Signature	Organization
_____	_____
Typed or Printed Name and Grade	Address of Organization

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
MC	20070202

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

Commissioned Officer, U.S. Marine Corps
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Jeffrey D. Groharing
Signature

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IV. NOTICE TO THE ACCUSED

6. On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

Jeff Groharing, Major, U.S. Marine Corps
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

Office of the Chief Prosecutor, OMC
Organization of the Person Who Caused Accused to Be Notified of Charges

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order _____

_____.

_____ subject to the following instructions[1]: _____

_____

By _____ of _____.
Command, Order, or Direction

_____ _____
Typed Name and Grade of Officer *Official Capacity of Officer Signing*

_____
Signature

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

_____ _____
Typed Name of Trial Counsel *Grade of Trial Counsel*

_____
Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

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Attachment A

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**Conspiracy**
	)	
OMAR AHMED KHADR	)	**Providing Material Support for Terrorism**
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**Spying**
a/k/a "Ahmed Muhammed Khali"	)	

INTRODUCTION

1. The accused, Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, a/k/a Ahmed Muhammed Khali, hereinafter "Khadr"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this Military Commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and the final determination of the Combatant Status Review Tribunal of September 7, 2004, that Khadr is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The accused's charged conduct is triable by a military commission.

BACKGROUND

4. Khadr was born on September 19, 1986, in Toronto, Canada. In 1990, Khadr and his family moved from Canada to Peshawar, Pakistan.

5. Khadr's father, Ahmad Sa'id Khadr (a/k/a Ahmad Khadr a/k/a Abu Al-Rahman Al-Kanadi, hereinafter Ahmad Khadr), co-founded and worked for Health and Education Project International-Canada (HEPIC), an organization that, despite stated goals of providing humanitarian relief to Afghani orphans, provided funding to al Qaeda to support terrorist training camps in Afghanistan. Ahmad Khadr was a senior al Qaeda member and close associate of Usama bin Laden and numerous other senior members of al Qaeda.

6. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents.

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Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

7. In 1996, Khadr moved with his family from Pakistan to Jalalabad, Afghanistan.

8. From 1996 to 2001, the Khadr family traveled throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden's compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw or personally met senior al Qaeda leaders, including Usama bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef (a/k/a Abu Hafs al Masri), and Saif al Adel. Khadr also visited various al Qaeda training camps and guest houses.

9. After al Qaeda's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.

10. In the summer of 2002, Khadr received one-on-one, private al Qaeda basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.

11. After completing his training, Khadr joined a team of other al Qaeda operatives and converted landmines into remotely-detonated improvised explosive devices, ultimately planting these explosive devices to target U.S. and coalition forces at a point where they were known to travel.

12. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of three members of the U.S. led coalition and injuries to several other U.S. service members.

GENERAL ALLEGATIONS

13. Al Qaeda ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

14. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

15. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

16. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

17. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and

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supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

18. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans,*" in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

19. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

20. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

21. In or about 2001, al Qaeda's media committee created As Sahab ("The Clouds") Media Foundation, which has orchestrated and distributed multi-media propaganda detailing al-Qaeda's training efforts and its reasons for its declared war against the United States.

22. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

23. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

24. On or about October 8, 1999, the United States designated al Qaeda a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

CHARGE 1: VIOLATION OF PART IV, M.M.C. SECTION 950v(15), MURDER IN VIOLATION OF THE LAW OF WAR

25. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.

CHARGE II: VIOLATION OF PART IV, M.M.C., SECTION 950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

26. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, between, on, or about June 1, 2002, and July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.

CHARGE III: VIOLATION OF PART IV, M.M.C., SECTION 950v(28), CONSPIRACY

27. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from on or about June 1, 2002 to on or about July 27, 2002, willfully join an enterprise of persons who shared a common criminal purpose, said purpose known to the accused, and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission to include: attacking protected property; attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism.

28. In addition to paragraph 27, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet.

29. Additionally, in furtherance of this enterprise and conspiracy, Khadr and other members of al Qaeda performed overt acts, including, but not limited to the following:

a. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

b. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

c. In or about July 2002, Khadr attended one month of land mine training.

d. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

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e. On or about July 27, 2002, near the village of Ayub Kheil, Afghanistan, U.S. forces surrounded a compound housing suspected al Qaeda members. Khadr and/or other suspected al Qaeda members engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. Khadr and/or the other suspected al Qaeda members also threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

f. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE IV: VIOLATION OF PART IV, M.M.C., SECTION 950v(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

30. Specification I: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such organization that engaged, or engages, in terrorism, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

31. In addition to paragraph 30, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

32. Specification II: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

33. In addition to paragraph 32, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

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CHARGE V: VIOLATION OF PART IV, M.M.C., SECTION 950v(27), SPYING

34. Specification. In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to convey such information to an enemy of the United States, namely al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of the following acts: on at least one occasion, at the direction of a known al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, time, and direction of the convoys.

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	D18 GOVERNMENT'S RESPONSE To the Defense's Motion For Appropriate Relief (Strike Terrorism from Charge III) 22 January 2008

1. Timeliness: This motion is filed within the timelines established by the Military Judge's scheduling order of 18 January 2008.

2. Relief Requested: The Government respectfully submits that the Defense's motion to strike terrorism as an object of the conspiracy alleged in Charge III ("Def. Mot.") should be denied.

3. Overview:

a. Congress has clearly authorized military commission jurisdiction over "terrorism," as that offense is defined in the MCA. Congress has unquestioned authority "To define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. And "terrorism" is plainly one such "Offense." Indeed, the offense of terrorism is so emphatically prohibited by the law of nations that it is triable by military commission, even in the absence of the MCA.

b. The Ex Post Facto Clause is irrelevant here because (i) binding precedent renders the Constitution inapplicable to the accused, (ii) the underlying conduct for which Khadr is charged was illegal—under both domestic and international law—prior to the passage of the Military Commissions Act of 2006 ("MCA"), and (iii) Khadr cannot conceivably argue that he is in a worse position on account of being forced to stand trial before a military commission. And even if it were true (which it is not) that international law created an ex post facto obligation on the United States, *no one*—including the Defense—has ever suggested that Congress would thereby be prohibited from passing inconsistent legislation.

c. For all of these reasons, the motion for appropriate relief should be denied.

4. Burden and Persuasion: As the moving party, the Defense bears the burdens of proof and persuasion. *See* Rule for Military Commissions ("RMC") 905(c)(2)(A); Military Commission Trial Judiciary ("MCTJ") Rules of Court, Rule 3(7)(a). Notwithstanding the Defense's suggestion to the contrary, its motion is not "jurisdictional in nature." Def. Mot. at 2. Rather, it is a motion to strike a particular charge as a matter of law. Therefore, the burdens of proof and persuasion are on the Defense.

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation.

e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

f. In or about July 2002, the accused planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See* AE 17, attachment 4.

h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.

i. The accused and three other individuals decided not to surrender and instead "vowed to die fighting." *Id.*

j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*

k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.

l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire. *See id.*, attachment 4.

m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.

n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded "to kill U.S. forces." *Id.*, attachment 6.

o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*

p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a $1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

s. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:

A. CONGRESS HAS DEFINED TERRORISM AS A WAR CRIME, TRIABLE BY MILITARY COMMISSION

i. The Constitution vests Congress with the exclusive authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10 (emphasis added). Exercising

that authority in the MCA, Congress unequivocally defined "terrorism"[1] as an offense triable and punishable by military commission.

a. As the Defense points out in two separate places, *see* Def. Mot. at 3 & 5, "[w]hen . . . neither the elements of the offense nor the range of permissible punishments is **defined by statute** or treaty, the precedent must be plain and unambiguous." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (emphasis added). As the Defense twice ignores, however, the offense of terrorism is unequivocally defined by statute. *See* 10 U.S.C. § 950v(b)(24) (authorizing military commissions to try "terrorism" as a substantive offense under the MCA). Congress has thus statutorily "define[d] and punish[ed]" terrorism as an "Offense[] against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. *Hamdan*'s "plain and unambiguous" dictum—along with the Defense's attempts to rely upon it—is therefore unavailing.

b. The MCA creates military commission jurisdiction for "any offense made punishable by this chapter [i.e., the MCA] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." 10 U.S.C. § 948d(a). Terrorism is undeniably an "offense made punishable by" the MCA,[2] and the facts clearly occurred "before, on, or after September 11, 2001." And just to make clear its intent that the MCA applies to offenses committed "before, on, or after September 11, 2001," Congress also emphasized that the MCA's punitive articles—including its definition of "terrorism"—may apply to "crimes that occurred *before* [October 17, 2006]." 10 U.S.C. § 950p(b) (emphasis added).

c. The Defense's suggestion that "Congress did not intend the MCA to apply retroactively" beggars belief. Def. Mot. at 6. It is a bedrock principle of statutory interpretation that "the plain language of the enacted text is the best indicator of intent." *Nixon v. United States*, 506 U.S. 224, 232 (1993). Here, Congress expressly provided in the MCA's plain text—not once, but ***twice***—that this Court has jurisdiction to try the substantive offense of "terrorism," even when committed prior to the MCA's enactment. It is difficult to imagine what more Congress could have done to express its intent, short of using bold-faced fonts or exclamation points. *Cf. Boumediene v. Bush*, 476 F.3d 981, 987 (D.C. Cir.) ("It is almost as if [Members of Congress] were slamming their fists on the table shouting 'When we say "all," we mean all—**without exception!**'") (emphasis in original), *cert. granted*, 127 S. Ct. 3078 (2007).

ii. All of the Defense's discussion regarding the scope of international law is irrelevant. *See* Def. Mot. at 3-5, 12. Congress has "defined" and "punished" terrorism as a violation of the law of nations. *See* U.S. Const. art. I, § 8, cl. 10; 10 U.S.C. § 950v(b)(24). And that ends the matter.

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[1] The Government has explained in other pleadings in this case that conspiracy is a well-established violation of the law of war. This brief—like the Defense's motion—is limited to the question of whether terrorism is a violation of the law of war, triable by military commission.

[2] As explained below, it is also an offense made punishable under the law of war. *See* pp. 5-14, *infra*.

a. In accordance with the offenses defined in the MCA, the Secretary of Defense promulgated the elements for terrorism, *see* Manual for Military Commissions ("MMC"), at IV-17 to -18 (Jan. 18, 2007).

b. Khadr does not claim that his charge sheet conflicts with the elements set forth in the MMC. Nor does he claim that the MMC conflicts with the MCA.

c. Instead, Khadr inexplicably claims that trying him for conspiracy to commit terrorism before a military commission is impermissible because it would violate *non-binding* principles of U.S. and international law—notwithstanding the fact that Congress expressly legislated that result. That argument is ridiculous, and it must be rejected. *See also* Part 6(C), *infra.*

iii. Because "terrorism" is a substantive offense triable by military commission, conspiracy to commit terrorism is also a substantive offense triable by military commission. *See* 10 U.S.C. § 950v(b)(28) (authorizing military commissions to try anyone "who conspires to commit one or more substantive offenses triable by military commission," including "terrorism"); *see also* MMC at IV-20 (defining the elements for "conspiracy" to commit terrorism).

B. TERRORISM IS A WELL-ESTABLISHED WAR CRIME

i. Congress has expressly defined terrorism as a war crime, triable before a military commission, and that determination must be dispositive. In order for the Military Judge to reach the question of whether terrorism is a well-established war crime beyond the MCA, this Court would have to be the ***first in the history of the United States*** to hold that Congress unconstitutionally "defin[ed]" and "punish[ed]" an "Offense[] against the Law of Nations."

a. *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), is not to the contrary. As an initial matter, *Furlong*'s statements about the outer-reaches of Congress's authority under the Offenses Clause are *dicta*, given that the Court's opinion was based on Congress's intent with respect to a particular statute, rather than the limits of Congress's authority under the Offenses Clause. *See id.* at 198. The Defense can point to no case—ever—holding that Congress exceeded its constitutional powers under the Offenses Clause.

b. In fact, numerous authorities recognize that the Offenses Clause entitles Congress to substantial deference in defining violations of the law of nations:

> [E]ven assuming that the acts described in [18 U.S.C. §§ 2332 & 2332a] are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under [U.S. Const. art. I, § 8,] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. *See United States v. Smith*,

> 18 U.S. (5 Wheat.) 153, 159 (1820) (Story, J.) ("Offenses . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. . . . [T]herefore . . . , there is a peculiar fitness in giving the power to define as well as to punish."); Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 611 (1987) ("Congress may define and punish offenses in international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.").

United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000) (footnote omitted), *criticized on other grounds by United States v. Gatlin*, 216 F.3d 207, 212 n.6 (2d Cir. 2000); *see also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 142 (2007) ("We might assume . . . that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is."); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 335 (2001) ("While it might be unclear in some cases whether particular conduct violates international law, courts are likely to afford Congress substantial flexibility in making this determination, given that Congress is expressly given the power to 'define.'").

c. Thus, Congress has significant discretion in the exercise of its constitutional authority "to define and punish . . . Offenses against the Law of Nations." As Joseph Story emphasized in his prized treatise: "Offences against the law of nations are quite [] important, and cannot with any accuracy be said to be completely ascertained, and defined in any public code, recognized by the common consent of nations." Joseph Story, *Commentaries on the Constitution*, § 565, at 407 (R.D. Rotunda & J.E. Nowak eds., 1987). Given the importance and the ambiguity in the law of nations, the Framers intentionally gave Congress the "peculiar . . . power to *define* as well as to punish." *Id.* (emphasis added).[3]

ii. Moreover, the Defense is wrong about the appropriate standard for defining violations of the law of war.

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[3] The "peculiarity" of the Offences Clause bears emphasis; indeed, the power to "define" violations of the law of nations is one of the most sweeping powers given to Congress in Article I, § 8. By giving Congress the power to "define" such violations, the Offenses Clause stands in sharp contrast to other constitutional provisions, such as the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which nowhere refers to Congress's authority to define the meaning of "Commerce." In addition, what actually is an offense against the law of nations is far closer to an inherently political question, not amenable to judicial review, than whether carrying a gun in a school is a commercial activity. *Compare, e.g., Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952)), *with, e.g., United States v. Lopez*, 514 U.S. 549 (1995). Accordingly, whatever level of deference is appropriate to Congress's judgments with respect to its interpretations of other constitutional provisions, such as the Commerce Clause, a far greater level of deference is required with respect to Congress's definition of law-of-war violations.

a. In the Defense's view, "[f]or an offense to constitute a violation of the law of war, it must be recognized as an offense against the law of war by 'universal agreement and practice both in this country and internationally.'" Def. Mot. at 3 (quoting the Court's plurality opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006)).

b. But the Defense can point to *no case*—and certainly nothing in the *non-binding* plurality opinion in *Hamdan*[4]—that suggests "universal agreement and practice" is the minimally acceptable standard for defining violations of the law of war. The Court has held that the line between unlawful combatants (like Khadr) and lawful ones is rooted in "universal agreement and practice," *see Ex Parte Quirin*, 317 U.S. 1, 30 (1942), but it has never suggested that *Quirin*'s dictum establishes a floor. To the contrary, as the Defense itself appears to concede, the standard is one of ***general acceptance***. *See* Def. Mot. at 3 (noting the force of the law of war derives from the fact that "'it has been generally accepted as a rule of conduct'") (quoting *The Paquete Habana*, 175 U.S. 677, 711 (1900)). Even the non-binding plurality opinion in *Hamdan* required nothing more than "a substantial showing" that the law of war has "acknowledged" a given offense. *See* 126 S. Ct. at 2780 (plurality). The Defense's suggestions (and selective quotations) to the contrary are belied by the very cases it cites.

iii. But even taking the Defense's motion on its own terms, and even assuming that the MCA somehow does not apply, it is simply untenable to argue that terrorism is not "proscribed by the international law of war," Def. Mot. at 3, as the Defense itself appears to recognize, *see id.* at 4 (conceding that "'terrorism' . . . encompasses a wide range of substantive offenses," which are triable by military commission).[5]

The Geneva & Hague Conventions

iv. Thus, regardless of the appropriate standard for "defin[ing]" violations of the law of nations, there is no question that "terrorism" constitutes such a violation. It is difficult to imagine a crime more offensive to the law of war than, for example, the hijacking of civilian aircraft and the use of those aircraft as weapons to slaughter almost 3,000 innocent civilians. Such an attack plainly violates the text and the principles of both the Geneva Conventions and the Hague

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[4] It should be obvious that any portion of an opinion that commands only a four-Justice plurality is not a binding precedent. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) ("[W]e are not bound by [a plurality opinion's] reasoning."); *see also Horton v. California*, 496 U.S. 128, 136 (1990) (reaffirming that a plurality view that does not command a majority is not binding precedent); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 300 n.7 (D.C. Cir. 2006) (A plurality opinion "is not binding precedent but a 'considered opinion' that 'should be the point of reference for further discussion of the issue.'" (quoting *Texas v. Brown*, 460 U.S. 730, 737 (1983) (opinion of Rehnquist, J.))).

[5] In its reply brief for the motion to dismiss Charge IV (*see* p. 3), the Defense suggests it would be a "logical fallacy"—on par with concluding that "all trees are oaks"—to conclude that all terrorist acts are war crimes. That argument does indeed contain a "logical fallacy"—but it is a byproduct of the Defense's own circular reasoning. The only way to dispute that all acts of terrorism are war crimes is to presuppose, as the Defense does, that they are not.

Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781.[6]

a. For example, targeting and murdering thousands of innocent civilians clearly constitutes a "grave breach" (A) under the Geneva Conventions by killing "protecting persons," *see, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, (B) under the Hague Regulations by inflicting unnecessary death and suffering on the target population, *see* Regulations Respecting the Laws and Customs of War on Land, Art. 23, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, and (C) under Common Article 3 by purposely killing non-combatants, *see, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

b. As the authoritative treatise on the Geneva Conventions points out, it is a "cardinal principle of the law of war . . . that the civilian population must enjoy complete immunity." 4 International Committee of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 3 (J. Pictet ed., 1958). Thus, Article 33 of the Fourth Geneva Convention expressly prohibits "all measures . . . of terrorism." Al Qaeda's terrorist attacks—carried out in complete contempt for that "cardinal principle" of the laws of war—constitute war crimes.[7]

c. Given that al Qaeda is not a State, and given the Supreme Court's decision that our war with al Qaeda is a conflict "not of an international character" that is governed by Common Article 3, *see Hamdan*, 126 S. Ct. at 2795, that provision is of particular relevance here.

1. As an initial matter, there can be no doubt that violations of Common Article 3 are war crimes. The federal War Crimes Act was amended in 1997 to cover expressly all violations of Common Article 3. *See* 18 U.S.C. § 2441 (2000). Every federal court to consider the issue has concluded that violations of Common Article 3 are "serious violations of international law" and "war crimes." *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998).

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[6] Of course, these instruments do not apply directly to al Qaeda. *See* Memorandum from the President, *Re: Humane Treatment of Taliban and al Qaeda Detainees*, The White House (Feb. 7, 2002). The President's determination turned, in part, on the Department of Justice's legal conclusion that al Qaeda systematically scorns the law of war, and it is therefore not entitled to its protections.

[7] Given the Defense's heavy reliance upon Additional Protocol I to the Geneva Conventions, *see* Def. Mot. at 12 nn. 19 & 23, it is ironic that the Defense ignores Article 51(2) of that Protocol, which provides: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." To the extent the Defense thinks the Protocol is relevant, it is difficult to imagine a clearer enunciation of al Qaeda's war crimes. *See also* Additional Protocol II, Art. 4(2)(d) (prohibiting "acts of terrorism" "at any time and in any place whatsoever"); *id.*, Art. 13(2) ("Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."). Given that the United States refused to ratify both instruments because they afford *undue rights* to terrorists, *see infra* note 16, it should go without saying that the United States denounces terrorism at least as strongly as the Protocols do.

2. Although they are not binding on the United States, several other instruments of international law demonstrate a global consensus that violations of Common Article 3 are war crimes. For example, Article 8 of the Rome Statute specifically criminalizes violations of Common Article 3. Article 4 of the statute authorizing the International Criminal Tribunal for Rwanda also imposes individual criminal liability for serious violations of the provision, including "acts of terrorism." And although the statute authorizing the International Criminal Tribunal for the former Yugoslavia ("ICTY") does not expressly cover violations of Common Article 3, the ICTY held that the statute's provision concerning "other serious violations of the laws and customs of war" necessarily includes violations of Common Article 3. *See, e.g.*, *Prosecutor v. Tadic*, No. IT-94-1-AR72, ¶¶ 87-91 (ICTY Appeals Chamber 1995), *reprinted in* 35 I.L.M. 32 (1996). And the ICTY has charged and convicted a former military officer for "unlawfully inflicting terror upon civilians." *Prosecutor v. Galic*, No. IT-98-29-T, ¶ 12 (ICTY Trial Chamber 2003). Finally, the criminal law and military manuals of many other states recognize violations of Common Article 3 as war crimes. *See, e.g.*, Tom Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law in Non-International Armed Conflicts*, 322 Int'l Rev. Red Cross 29 (1998) (collecting sources).

d. The accused has never disputed his association with senior members of al Qaeda—including Osama bin Laden himself—in the years directly preceding the horrific attacks of September 11th. *See* AE 17, attachment 2. Those attacks plainly constituted "terrorism" in violation of the Geneva Conventions and the Hague Conventions. And in the wake of September 11th, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives, including IEDs—all with the object of supporting al Qaeda, which, as Khadr admits, is a terrorist organization. *See id.*, attachment 3.

Other Conventions & Sources of International Law

v. Moreover, the prohibitions of terrorism under international law extend beyond the Geneva Conventions and the Hague Conventions.

a. To apprehend and prosecute international terrorists, the United States relies upon no fewer than twelve antiterrorism treaties, some of which expressly condemn terrorist bombings (in general) and plane bombings (in particular), in addition to the killing of innocent civilians. *See* International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, 18 I.L.M. 1419, 1456 U.N.T.S. 1987; International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. Doc A/34/46 (Dec. 17, 1979), 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28

U.S.T. 1975, 1035 U.N.T.S. 167; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

b. In the 1990s, the United Nations Security Council—with the approval of the United States—repeatedly denounced Osama bin Laden and his associates as terrorists, and it emphatically condemned al Qaeda's actions as war crimes. *See, e.g.*, S.C. Res. 1189 (Aug. 13, 1998) (al Qaeda's attacks on US embassies in Kenya and Tanzania). In 1999, the Security Council established the "Al-Qaida and Taliban Sanctions Committee," again condemning Osama bin Laden's actions. *See* S.C. Res. 1267 (Oct. 15, 1999); *see also* S.C. Res. 1333 (Dec. 19, 2000); S.C. Res. 1390 (Jan. 16, 2002); S.C. Res. 1455 (Jan. 17, 2003); S.C. Res. 1526 (Jan. 30, 2004); S.C. Res. 1617 (July 29, 2005); S.C. Res. 1735 (Dec. 22, 2006).

c. In the wake of September 11th, the Security Council—again, with the support of the United States—reaffirmed its condemnation of international terrorism as a crime and as a threat to international security. *See* S.C. Res. 1373 (Sept. 28, 2001). Furthermore, it called on all member states to prosecute terrorists. *See id.* §§ 1-2, 4-5.

d. Thus, regardless of whether there is an "international consensus on the definition of terrorism," Def. Mot. at 4, it is abundantly clear that the international community (in general) and the United States (in particular) has uniformly and consistently defined al Qaeda as a terrorist organization and has condemned its agents—such as Khadr—as terrorists. It is untenable to argue that Khadr somehow thought that supporting and fighting for al Qaeda was "innocent when done." Def. Mot. at 8.

The Common Law of War

vi. Even beyond the formal principles codified in international treaties, conventions, and Security Council resolutions, terrorism (and conspiracy to commit it) has long violated the common law of war.

a. The year before he published what would become a cornerstone in the law of war,[8] Dr. Francis Lieber emphasized that "guerillas," and those who associate themselves with

[8] Lieber's *Instructions for the Government of the Armies of the United States in the Field* (1863), also known as *Lieber's Code*, became a cornerstone in the law of war when it was issued by President Lincoln as General Orders No. 100 during the Civil War. *See also* G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173, 179 (1971) ("[T]he writings of Lieber were the first major attempt to give written form to the customary rules of land warfare prevailing at the end of the first half of the nineteenth century."). Like Lieber's *Guerilla Parties*, *Lieber's Code* emphasizes that those—such as Khadr—who dress as civilians and yet commit hostilities are subject to summary execution. *See Lieber's Code* ¶ 82 ("Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.").

guerillas, were subject to summary execution under the law of war. In a description that eerily applies with equal force to modern-day terrorists, Dr. Lieber emphasizes:

> [A] guerilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerilla party, to carry on what the law terms a *regular* war. The irregularity of the guerilla party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, . . . and it is irregular as to the permanency of the band, which ban be dismissed and called again together at any time.

Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War* 8 (1862) (emphasis in original). Lieber goes on to explain that the term "guerilla" is often connected to "the idea of destruction for the sake of destruction," "the ideas of general and heinous criminality, . . . because the organization of the party being but slight and the leader utterly dependent upon the band, little discipline can be enforced," and the idea of a "spy, . . . because he that to-day passes you in the garb and mien of a peaceful citizen, may to-morrow, as a guerilla man, fire your house or murder you from behind the hedge." *Id.* at 8-9.

1. Lieber also emphasizes that the definition of the term "guerilla" is "particularly confused" under the law of war. *See id.* at 1. ***But, importantly, the lack of a clear definition for "guerillas" did not preclude their punishment.***[9]

2. To the contrary, during the Peninsular War (1808-1814), many guerillas "were shot when made prisoner." *Id.* at 7. Thus, Lieber concludes, "[g]uerilla parties . . . do not enjoy the full benefit of the law of war. They are apt to fare worse than either regular troops or an armed peasantry. The reasons for this are, that they are annoying and insidious, that they put on and off with ease the character of a soldier, and that they are prone, themselves, to treat their enemies who fall into their hands with great severity." *Id.* at 18.

3. Lieber then explains—in terms that almost exactly describe the circumstances under which Khadr fought and was captured—that:

> The law of war . . . would not extend [its protections] to small bodies of armed country people, near the lines, whose very smallness shows that they must resort to occasional fighting and the occasional assuming of peaceful habits, and to brigandage. The law of war would still less favor them when they trespass within the hostile lines to commit devastation, rapine, or destruction. Every European army has treated such persons, and it seems to me would continue, even in the improved state of the present usages of war, to treat them as brigands, whatever prudential mercy might decide upon in single cases.

[9] Thus, it is irrelevant whether, as the Defense asserts, "there is not . . . international consensus on the definition of terrorism." Def. Mot. at 4. And even if it were relevant, there can be no question that Khadr's actions—including conspiring with al Qaeda for more than 5 years—constitute "terrorism" under ***anyone's*** definition.

Id. at 20. Brigands—even those who had not committed crimes, such as pillaging, independent of their brigandage—were "subject to the infliction of death, if captured." *Id.* at 10.

4. Like members of al Qaeda, different guerillas were motivated by different things. *See id.* at 9-21. But many of them, like Khadr, were motivated by their desire to fight, intimidate, and retaliate against legitimate armies. *See, e.g., id.* at 9;[10] *see also* 10 U.S.C. § 950v(b)(24) (defining "terrorism" as killing, inflicting "great bodily harm" or exhibiting "a wanton disregard for human life" as a means to, *inter alia*, "intimidat[e]" or "retaliate against government conduct"). And all of them, like Khadr, were guilty of violating the law of war.

b. In accordance with Lieber's view, the Attorney General long ago emphasized that "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; *the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.*" 11 Op. Atty. Gen. 297, 312 (1865) (emphasis added).

c. In other words, an unlawful combatant, such as Khadr, violates the law of war simply by conspiring with an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop, *Military Law and Precedents*, 784 (1895, 2d ed. 1920).

d. Colonel Winthrop notes that during the Civil War, numerous individuals were charged—and were *"liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission"*—simply for working with guerilla forces or "[i]rregular armed bodies" to accomplish the groups' unlawful ends. *Id.* at 783-84 (emphasis added). *See also* 11 Op. Atty. Gen. at 314 ("A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war").

1. For example, there were "numerous rebels . . . that . . . [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." H.R. Doc. No. 65, 55th Cong., 3d Sess., 234 (1894).

2. One well-recognized war crime—triable by military commission, if the offender was not summarily executed—was "consorting" or "cooperating" with the banditti,

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[10] As Lieber notes, guerilla warfare often resembles "the wars recorded in Froissart or Comines, or the Thirty Years' War, and the Religious Wars in France." Lieber's *Guerilla Parties* at 9. Jean Froissart's *Chroniques* and Philippe de Comines' *Mémoires sur les règnes de Louis XI et de Charles VIII* include famous descriptions of politically motivated guerilla warfare—such as the border skirmishes between Scotch guerillas and the English army after the Battle of Bannockburn (*see* Froissart, book I, ch. XIV). And the Thirty Years War—like the Religious Wars in France—was marked with politically motivated violence by guerilla groups, such as the bands of Bavarian peasants that attacked Gustavus Adolphus to retaliate against "Protestant fiends." *See* William P. Guthrie, *Battles of the Thirty Years War* 187 (2002).

jayhawkers, or guerillas. *See*, *e.g.*, U.S. War Dept., General Court-Martial Order No. 41, p. 1 (1864) ("G.C.M.O.") (indictment in the military commission trial of John West Wilson charged that Wilson "did join and co-operate with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens . . . in violation of the laws and customs of war"); G.C.M.O. No. 93, p. 9 (1864) (indictment in the military commission trial of James A. Powell charged "[t]ransgression of the laws and customs of war" and specified that he "did join himself to and, in arms, consort with . . . a rebel enemy of the United States, and the leader of a band of insurgents and armed rebels"); *id.* at 10-11 (indictment in the military commission trial of Joseph Overstreet charged "[b]eing a guerrilla" and specified that he "did join, belong to, consort and co-operate with a band of guerrillas, insurgents, outlaws, and public robbers").

e. Modern-day terrorists, including those that fight for al Qaeda, can trace their lineage indirectly to the guerillas that Lieber, Winthrop, and others emphatically condemned. As one scholar has explained:

> More recently guerilla activities have been conducted as a method of securing specific political objectives by groups or organizations disassociated from States or other belligerents, and directed at particular governments, their nationals and property, where and whenever opportunity presents itself. Thus we have arrived at a time when guerilla warfare, in the sense of sporadic and clandestine actions of armed violence for specific political purposes by loosely organized groups in varying degrees of associate with, or disassociation from, any government, is a feature of our age. Its manifestations are very diverse and often effective. The capacity of these groups, however small, to inflict substantial damage upon military formations during an armed conflict, and upon the civilian popular in times of relative normality, is not disputable.

G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173, 183 (1971). Although this passage was written almost two decades before al Qaeda's formation, it perfectly describes that organization's guerilla-like tactics. And like its guerilla-party forefathers, al Qaeda's existence and operation constitutes terrorism in violation of the law of war.

vii. Against this overwhelming weight of authority, the Defense can muster only a half-hearted concession—namely, that "'terrorism' . . . encompasses a wide range of substantive offenses," which ***are*** triable by military commission,[11] although the Defense argues that "terrorism," as such, is not. Def. Mot. at 4-5. That argument is wrong for at least two reasons.

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[11] For example, there can be no argument that hostage-taking—which Khadr concedes is a form of terrorism—is a violation of the law of war and therefore triable by military commission. *See*, *e.g.*, Common Article 3, ¶ 1(b) (prohibiting "taking of hostages"); 18 U.S.C. § 2441(d)(1)(I) (same); International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. Doc A/34/46 (Dec. 17, 1979), 1316 U.N.T.S. 205. Likewise with hijacking. *See*, *e.g.*, International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Hague Convention for the Suppression of Unlawful

a. First, as a matter of historical fact, those who supported, conspired, and consorted with guerillas, jayhawkers, and banditti were charged with "Violation of the law war." *See*, *e.g.*, Winthrop, *Military Law and Precedents* at 784; G.C.M.O. Nos. 41 & 93, *supra*. To be sure, that charge was supported with specific allegations—such as murder, burning and destruction of property, etc.—but the charge was a general one. *See also* 11 Op. Att'y Gen. at 312 (emphasizing that the "Offence" is accomplished simply by supporting the banditti; the specific atrocities committed by the banditti provide additional "reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war"); *Trial of Shigeki Motomura and 15 Others*, 13 L. Rep. Trials of War Criminals 138 (1947) (describing violations of "the laws and customs of war," including "systematic terrorism"). So here: Khadr has been charged with conspiring to commit terrorism, but that charge is supported by specific allegations, including that Khadr met and conspired with senior al Qaeda leaders, attended al Qaeda training camps, unlawfully planted IEDs, and killed an American soldier—all because he is an admitted al Qaeda terrorist, *see* AE 17, attachment 3, who wants to wage a holy war against the United States, *see id.*, attachments 6 & 9. The specific allegations against Khadr provide "the reasons, and sufficient reasons they are, why such [terrorists] are denounced by the laws of war," but they do not change the fact that *terrorism* is a chargeable "Offence."

b. Second, it is ***irrelevant*** whether terrorism, as such, is a substantive offense under the law of war. "Guerrilla warfare . . . is a method of warfare and not a concept of the law of war," Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. at 182, but no one could dispute that guerillas were triable by military commissions (if they were not summarily shot upon their capture) for being guerillas. *See, e.g.*, Winthrop, *Military Law and Precedents* at 783-84; G.C.M.O. Nos. 41 & 93, *supra*; *see also* G.C.M.O. No. 51, p. 1 (1866) (indictment in the military commission trial of James Harvey Wells charged "[b]eing a guerrilla"); G.C.M.O. No. 108, Head-Quarters Dept. of Kentucky, p. 1 (1865) (indictment in the military commission trial of Henry C. Magruder charged "[b]eing a guerrilla" and "join[ing]" "a band of guerrillas"). The important point—for guerillas and terrorists alike—is that the law of war unequivocally condemns their unlawful belligerency. And as a result, those accused of either are amenable to the jurisdiction of military commissions under the common law of war.

viii. Accordingly, long before Khadr began conspiring with and in support of al Qaeda, conspiracy to commit terrorism violated both U.S. and international law, and it has long been a well-established war crime. *See*, *e.g.*, Ingrid Detter, *The Law of War* 21-25 (2d ed. 2000); Christopher Greenwood, *War, Terrorism, and International Law*, 56 Current L. Probs. 505, 515 (2003); Derek Jinks, *September 11th and the Laws of War*, 28 Yale J. Int'l L. 1, 2 (2003). Thus, the MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a).[12]

Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

[12] The Defense suggests in a footnote, *see* Def. Mot. at 6 n.15, that 10 U.S.C. § 950p(a) should not be read "as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to the adoption of the M.C.A." That argument violates the first and most important principle of statutory interpretation—namely, that Congress means what it says. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute

C. KHADR'S EX POST FACTO ARGUMENTS ARE BASELESS

i. Because the Defense cannot plausibly deny that Khadr's conspiracy to commit terrorism was illegal when he engaged in it, the Defense focuses the vast majority of its argument on inapplicable ex post facto principles under U.S. and international law. *See* Def. Mot. at 5-12. While those arguments are long on words, they are short on law and logic.

ii. As an initial matter, controlling D.C. Circuit precedent unambiguously holds that the US Constitution does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr. *See Boumediene*, 476 F.3d at 992. The D.C. Circuit specifically rejected the argument—which Khadr also made unsuccessfully before the Court of Military Commission Review, *see* Br. for Appellee at 20-21—that the Ex Post Facto Clause imposes structural limitations on Congress. *See Boumediene*, 476 F.3d at 993. The D.C. Circuit has emphatically continued to follow *Boumediene*, even while that case is under review by the D.C. Circuit. *See Rasul v. Myers*, 2008 WL 108731, *14 & n.15 (D.C. Cir. Jan. 11, 2008). And Judge Allred recently followed *Boumediene* when he rejected Salim Hamdan's attempts to invoke the Ex Post Facto Clause (and other constitutional rights). *See United States v. Hamdan*, Reconsideration of Ruling on Motion to Dismiss for Lack of Jurisdiction, at 9 (Dec. 19, 2007). This Court need proceed no further to reject Khadr's constitutional claims.

a. In any event, raising such claims must take account of the fact that Congress passed and the President signed the MCA *precisely because* the Supreme Court invited the politically accountable branches to do so. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774-75 (2006); *see also id.* at 2799 (Breyer, J., concurring) ("*Nothing* prevents the President from returning to Congress to seek the authority he believes necessary [to try members of al Qaeda before military commissions].") (emphasis added).[13] Were the Defense to prevail in its argument that Khadr's prosecution is barred by the Ex Post Facto Clause, the Supreme Court's invitation would be transformed into a fool's errand.

b. The ambitiousness of Khadr's assertion that *all three* branches of the U.S. Government misunderstood the constitutional boundaries of military commissions, is matched only by its erroneousness.

iii. Equally baseless is the Defense's suggestion that "Khadr could not have foreseen in 2002 that the offense of conspiracy to commit terrorism would be triable by military commission four years later, nor foreseen the significantly different consequences that would result from that fact." Def. Mot. at 1.

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a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

[13] In its reply to the motion to dismiss Charge IV (*see* p. 5), the Defense accuses the Government of "selectively" quoting Justice Breyer and suggests that Justice Breyer also wrote: "If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so." That statement, however, comes from ***Justice Kennedy's concurrence***. *See* 126 S. Ct. at 2800 (Kennedy, J., concurring). The Government remains puzzled by the Defense's accusation to the contrary.

a. In November 2001—almost a year before Khadr was captured—the President issued Military Commission Order No. 1. *See* 66 Fed. Reg. 57,833 (Nov. 13, 2001). And under that order, individuals who where members of al Qaeda, or who "conspired to commit [] acts of international terrorism," were subject to military commission jurisdiction. *See id.* at 57,834. Individuals subject to trial by military commission were eligible for execution after trials with fewer procedural and substantive rights than are afforded by the MCA.

b. Khadr's suggestion that he was somehow caught off guard, or materially prejudiced, by the MCA is therefore baseless. When he conspired with members of al Qaeda to commit terrorism, the prospect of a military commission trial was very real.

iv. Moreover, even on its own terms, Khadr's constitutional claim is meritless. The Supreme Court has emphasized that the Ex Post Facto Clause is implicated only where (1) Congress "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), or (2) the statute "disadvantage[s] the offender affected by [it]," *id.* at 41. Neither condition is met here.

a. First, the MCA does not "retroactively alter the definition of" terrorism.

1. As explained above, the commission of terrorism has been a well-established war crime since at least the Civil War. And under the law of war, unlawful combatants like Khadr faced military commissions (at best) and summary execution (at worst) for openly flaunting the rules and customs that govern armed conflict. Thus, the MCA does not "retroactively alter the definition of" or "increase the punishment for" material support of terrorism, within the meaning of the Ex Post Facto Clause.[14]

2. To be sure, the MCA expressly applies to conduct that occurred in the past. *See* 10 U.S.C. § 950p(b) ("Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, *they do not preclude trial for crimes that occurred before the date of the enactment of this chapter*.") (emphasis added); *id.* § 948d(a) (creating military commission jurisdiction for "any offense made punishable by this chapter [i.e., the MCA] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001"). As a result, Khadr's so-called "presumption against retroactivity" is irrelevant. *See, e.g., Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the [statutory] language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."). But simply regulating past conduct—under the same

[14] Nor does the MCA "apply retroactively" in the sense described by the Supreme Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). That case held only that the Secretary of Health and Human Services was not statutorily authorized to require the retroactive recoupment of funds previously paid to private hospitals. As explained above, the MCA provides precisely the kind of statutory authority that was lacking in *Bowen*. Moreover, the MCA does not regulate "primary conduct," *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994); rather, it regulates the *procedure* for trying offenses that were already illegal under the preexisting law of war, *see* 10 U.S.C. § 950p(a).

substantive standards that have always applied to it—does not necessarily implicate the Ex Post Facto Clause, even where it is otherwise applicable.

3. It is therefore well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not implicate the Ex Post Facto Clause, much less violate it. Thus, courts have long held that the Clause does not apply to the abolition of old courts and the creation of new ones, *see, e.g.*, *Duncan v. State*, 152 U.S. 377 (1894), the creation or alteration of appellate jurisdiction, *see, e.g.*, *Mallett v. North Carolina*, 181 U.S. 589 (1901), the transfer of jurisdiction from one court or tribunal to another, *see, e.g.*, *People ex rel. Foote v. Clark*, 119 N.E. 329 (Ill. 1918), or the modification of a trial panel, *see, e.g.*, *Commonwealth v. Phelps*, 96 N.E. 349 (Mass. 1911). Indeed, the Supreme Court has emphasized that it has "upheld intervening procedural changes [under the Ex Post Facto Clause] *even if application of the new rule operated to a defendant's disadvantage in the particular case*." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (emphasis added).[15] The rationale for these decisions is clear: The Ex Post Facto Clause applies only to laws that retroactively alter the definition or consequences of a criminal offense—not to *jurisdictional* provisions that affect where or how criminal liability is adjudicated.

b. Second, Khadr cannot conceivably claim that he has been "disadvantaged" by the MCA's passage.

1. As explained above, banditti, jayhawkers, guerillas, and their modern-day equivalents were traditionally liable to be shot immediately upon their capture. Where such individuals have instead been tried, the United States has prosecuted them based upon offenses under the common law of war. Indeed, the MCA represents one of the first attempts of the United States to set out clearly, in its domestic law, the law of war offenses triable by military commissions. The fact that Congress chose expressly to define these law of war offenses does not amount to the creation of "new" offenses for purposes of the Ex Post Facto Clause. To the contrary, Khadr is certainly better off based upon the clarity provide by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare.

2. For example, unlike his historical predecessors, Khadr enjoys the statutory right to an adversarial proceeding, the right to both civilian and military defense counsel, *see* 10 U.S.C. §§ 948k, 949a(b)(1)(C), the right "to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing," *id.* § 949a(b)(1)(A), the right to be present at all sessions of the military commission, *see id.* § 949a(b)(1)(B), the presumption of innocence, *id.* § 949*l*(c), and, if he is convicted, the right to appellate counsel, *id.* § 950h, and the right to review of his sentence by the convening authority, *id.* § 950(b), the Court of Military

[15] Thus, the MCA's evidentiary rules—including, for example, the broad admissibility of hearsay—do not violate the Ex Post Facto Clause. The accused, like the Government, can rely upon those rules to introduce evidence, and in that sense, the MCA's rules are closely akin to retroactive procedural changes that the Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (noting that the legislature may retroactively alter rules governing the admissibility of evidence where doing so does not uniformly prejudice the defendant).

Commission Review, *id.* §§ 950c(a), 950f, the D.C. Circuit, *id.* § 950g(a), and the Supreme Court of the United States through writ of *certiorari*, *id.* § 950g(d).

3. Instead of summary execution, Khadr enjoys more legal process than any unlawful combatant ever detained or tried in any prior conflict anywhere in the world. Whatever an Ex Post Facto violation may entail, this is certainly not it.

v. Nor does international law impose an ex post facto limit on Congress.

a. First, the international law principles cited by Khadr are entirely non-binding and/or unenforceable. *See* Def. Mot. at 12 & nn.19-22.

1. The Rome Statute and the American Convention on Human Rights are obviously not binding, given that the United States has not ratified either instrument. Similarly, the Universal Declaration of Human Rights is a non-binding resolution passed by the General Assembly of the United Nations in 1948, which was never submitted to member states for ratification as a treaty and because it was never intended to be a binding instrument. *See, e.g.*, 5 M. Whiteman, Digest of Int'l L. 243 (1965).

2. Nor can Khadr invoke Executive Order 13107, section 6(a) of which expressly provides: "Nothing in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." 63 Fed. Reg. 68991, 68993 (Dec. 10, 1998). Similarly, the United States conditioned its ratification of the International Covenant on Civil and Political Rights upon its declaration that "Articles 1 through 27 of the Covenant"—including Article 15, cited by the Defense, *see* Def. Mot. at 12 n.23—"are not self-executing." Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, at 23 (1992). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring) (noting that non-self-executing treaties do not "create rights that are privately enforceable in courts" and therefore do not give individuals a right to enforce them, absent authorizing legislation).

3. Similarly, the Third and Fourth Geneva Convention may or may not be self-executing, *compare, e.g., id.* ("the Geneva Convention for the Protection of Civilian Persons in Time of War [and] the Geneva Convention Relative to the Treatment of Prisoners of War [are not self-executing because they] expressly call for implementing legislation"), *with United States v. Khadr*, No. 07-001, at 4 n.4 (C.M.C.R. 2007) (citing *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002), which suggested that Articles 87 and 99 of the Third Geneva Convention are self-executing). But in any event, Khadr has not asserted—much less established—that he is entitled to either Convention's protections. And as an alien unlawful enemy combatant, he certainly is not.

4. Finally, the Defense cites Article 75 of Additional Protocol I, which, according to the Defense, has been "recognized as customary international law by the U.S.," Def. Mot. at 12 n.21—notwithstanding the fact that Khadr is not entitled to the protections of the Geneva Conventions (much less the broader protections afforded by the Additional Protocol),

see 10 U.S.C. § 948b(g), and notwithstanding the fact that the United States has steadfastly refused to ratify the Protocol.[16] For this proposition, the Defense cites an "unclassified memorandum" by a handful of Department of Defense employees. Needless to say, such unpublished musings—which, even on their face, simply comprise ***personal opinions***—do not amount to binding declarations as to what is customary international law.[17] Khadr's suggestion that such an "unclassified memorandum" constitutes the view of the United States is a drastic overstatement, to say the least.

5. To be sure, a former Deputy Legal Adviser at the U.S. State Department has provided a more reliable endorsement of the broad outlines of Article 75. *See* Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference (Fall 1987), *in* 2 AM. U. J. INT'L L. & POL'Y 419, 427 (1987). Mr. Matheson, however, noted only that the United States supports, in principle,[18] "that no sentence [should] be passed and no penalty executed except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of

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[16] The United States refused to ratify Protocol I because it opposed extending the protections of the Geneva Conventions to terrorists and associated unlawful combatants, who flout the Conventions' strictures. As President Reagan explained:

> We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. . . . The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). Regardless of whether "Article 75 of Protocol I to the Geneva Conventions of 1949 articulates many of the fundamental guarantees 'which are recognized as indispensable by civilized peoples,'" *United States v. Khadr*, No. 07-001, at 15 n.24 (C.M.C.R. Sept. 24, 2007), it is perverse to argue that the United States should be bound, as a matter of customary international law, to provide terrorists and associated unlawful combatants the same protections it has steadfastly refused to grant them as a matter of treaty law.

[17] The "unclassified memorandum" expresses only its authors' personal opinions that Article 75's "fundamental guarantees" are part of customary international law; it does *not* purport to put forth the view of the United States. The memorandum provides only that "***[w]e*** view the following provisions as already part of customary international law." Unclassified Memorandum at 1 (emphasis added); *see also id.* (expressing "***our views***") (emphasis added); *id.* at 2 ("***we*** regard the following" as CIL) (emphasis added); *id.* ("The above lists are in the nature of ***an advisory opinion on our part***.") (emphasis added). It is a bedrock legal principle that an individual's views may be probative of customary international law *only* insofar as they provide "trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[18] It bears emphasizing that Matheson's comments were entirely aspirational. *See* 2 AM. U. J. INT'L L. & POL'Y at 427 (noting that "we . . . *support* [a certain] principle") (emphasis added); *see also id.* at 471 (remarks of former Legal Adviser Abraham D. Sofaer) (noting that the United States "*intend[s]* to consult with our allies to develop appropriate methods for incorporating [certain] provisions" of Protocol I) (emphasis added). Such "speculations . . . concerning what the law *ought* to be" are utterly immaterial. *The Paquete Habana*, 175 U.S. at 700 (emphasis added). *See also Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 265 (2d Cir. 2003) (holding neither "the policy-driven or theoretical work of advocates" nor the "personal viewpoints expressed in the affidavits of international law scholars" can serve as sources of customary international law).

regular judicial procedure." *Id.* at 427-28 & n.39 (citing Protocol I, Art. 75(4)). Matheson did *not* endorse, nor did he even cite, any of the specific subparagraphs of Article 75(4), which contain the "rights" that the Defense attempts to invoke. To the contrary, he simply (and unremarkably) suggested that customary international law embraces the "judicial guarantees" that are codified in Common Article 3. And as Congress emphasized in the MCA, the rights provided in that statute—*not* the Additional Protocol—provide "all [of] the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." 10 U.S.C. § 948b(f).[19]

6. Thus, none of the international legal "authorities" cited in Khadr's brief provide him with an enforceable right against ex post facto legislation.

b. Second, even if binding, all of these international-law principles are irrelevant in light of the MCA. Khadr has not cited one case for the proposition that Congress is bound by international law. As the Supremacy Clause makes clear, it is the *Constitution* that is the supreme law of the land, and not an "unclassified memorandum" by an employee of the Department of Defense or the Rome Statute. *See* U.S. Const. art. VI, cl. 2.

1. There is absolutely no doubt that Congress is not bound by international law. *See, e.g., TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that international law is relevant to U.S. courts "where there is no treaty and no controlling executive or legislative act or judicial decision").

2. Nor does the canon of construction articulated by *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), stand to the contrary. There, the Supreme Court held that an ambiguous statute should be construed, to the extent possible, not to conflict with international law. *See id.* at 118. As the Second Circuit recently explained, however, "[t]his canon of statutory interpretation . . . does not apply where the statute at issue admits no relevant ambiguity." *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). And as explained above, *see* p. 4, *supra*, it is difficult to imagine how Congress could have more clearly expressed its intention that the MCA would apply to offenses—including terrorism—committed prior to its enactment.

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[19] Although the Defense fails to cite it, it is also true that the four-Justice plurality in *Hamdan* suggested that "it appears" as though the United States regards certain parts of Article 75 as customary international law, citing only a law review article written by a former Legal Adviser at the State Department. *See* 126 S. Ct. at 2797 (plurality op.) (citing Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (2003)). Of course, even the plurality did not endorse Article 75's ex post facto principle as customary international law. Moreover, as discussed above, the plurality's reasoning is not binding on this Court. *See supra* note 4 and accompanying text.

7. Oral Argument: In light of the fact that the MCA directly and conclusively addresses the issue presented, the Prosecution believes that the motion could be readily denied. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

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	D018
UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Reply** to Government Response to Defense Motion for Appropriate Relief (Strike Terrorism from Charge III) 28 January 2008

1. **Timeliness:** This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Overview:**

a. The central issue is whether conspiracy to commit terrorism was triable by military commission at the time of Mr. Khadr's alleged conduct. Military commissions, in 2002, only had jurisdiction over a charge where Congress had specifically given them such jurisdiction or where the charged conduct violated the law of war. 10 U.S.C. § 821 (1998). At the time of Mr. Khadr's alleged conduct, conspiracy to commit terrorism did not fall into either category.

b. Although the prosecution attempts to argue that terrorism, and therefore conspiracy to commit terrorism, was a violation of the law of war in 2002, this argument fails for two reasons. Neither terrorism nor conspiracy to commit terrorism were violations of the law of war in 2002. The prosecution primarily argues that the MCA supplies a basis for jurisdiction either by retroactively changing the content of the law of war or by now making terrorism and conspiracy to commit terrorism triable by military commission. The former argument is wrong as a matter of U.S. law. Congress may not retroactively change the content of international law. The latter argument is irrelevant. The question is not what the law is now, but what the law was when the alleged offense occurred.

c. Applying the MCA retroactively to conduct that occurred, according to the government's own allegations, four years *before* the statute was enacted violates both U.S. and international law proscriptions on *ex post facto* legislation. Mr. Khadr's detainment at Guantanamo does not permit the Congress to ignore this structural limitation on its power.

d. Accordingly, because the government has failed to show a statutory or law of war basis for terrorism, this Commission must strike terrorism as on object of the alleged conspiracy in Charge III.

3. **Burdens of Proof and Persuasion:** The government contends that the burden of proof is on the defense because the defense seeks to strike language from the specification. (Govt. Resp. at 1.) The basis for striking the language, however, is that the commission has no jurisdiction to try Mr. Khadr for conspiracy to commit terrorism. Accordingly, the motion is jurisdictional in nature, and the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

4. **Argument: Terrorism Must Be Dismissed As An Object Of The Alleged Conspiracy Because Terrorism Is Not An Offense Triable By Military Commission**

a. Terrorism Was Not An Offense Triable By Military Commission At The Time Of The Alleged Conduct

(1) The prosecution fundamentally misunderstands the basic issue in this case. That issue is not whether Congress can make terrorism or conspiracy to commit terrorism triable by military commission,[1] but whether it had done so at the time of Mr. Khadr's alleged conduct in 2002.

(2) The prosecution does not even dispute the fact that no U.S. statute made terrorism or conspiracy to commit terrorism triable by military commission at the time of the alleged conduct in this case. It is simply uncontestable that, in 2002, when Mr. Khadr's alleged conduct occurred, Congress had only made two offenses triable by military commission: aiding the enemy and spying. 10 U.S.C. § 904, 906. There was thus no statutory basis to try Mr. Khadr by military commission.

(3) Because there was no statutory basis to try Mr. Khadr by military commission, this Commission may only consider charges alleging conduct that plainly and unambiguously violates the law of war. *See* 10 U.S.C. § 821; *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.). Neither terrorism nor conspiracy to commit terrorism meet this standard. Indeed, as discussed below, the government has not made a substantial showing that either offense violates the law of war.

(4) The government contends that terrorism is a "well-established war crime." (Govt. Resp. at 5.) Yet, the government cannot point to a single precedent or authority establishing that "terrorism", as such, was punishable as offenses against the law of war before passage of the MCA. Instead, picking up on the defense's observation that some particular types of terrorism are war crimes, the government argues that *all* acts of terrorism must therefore be war crimes. (Govt. Resp. at 8-9.) This argument is based on an elementary logical fallacy. The fact that some acts of terrorism may violate the law of war does not make all acts of terrorism war crimes anymore than the fact that some trees are oaks, means that all trees are oaks. Anticipating this argument, the government contends that it is based on "circular reasoning", suggesting that "the only way to dispute that all acts of terrorism are war crimes is to presuppose . . . that they are not." (Govt. Resp. at 7 n.5.) The government is wrong – nothing must be presupposed. An examination of treaties and other sources of international law demonstrates that only some particular acts of terrorism that are well defined are war crimes.

[1] In an apparent attempt to obscure the fact that terrorism was *not* a violation of the law of war at the time of Mr. Khadr's alleged conduct, the prosecution devotes much of its response to the irrelevant argument that Congress has the power to make terrorism triable by military commission. Whatever the validity of this argument, it is simply irrelevant where, as here, Congress had *not* done so at the time of the alleged conduct. As discussed in Mr. Khadr's initial motion and below, the MCA cannot be applied (and should not be interpreted to apply) retroactively to offenses Mr. Khadr is alleged to have committed more than four years *before* the MCA's enactment.

(5) In mistakenly equating all acts of terrorism with attacks on civilians or other protected persons, the government states the obvious – that grave breaches of the Geneva and Hague Conventions and violations of Common Article 3 of the Geneva Conventions are war crimes. (Govt. Resp. at 8-9.) This is entirely beside the point. Mr. Khadr is not charged with committing a grave breach of any of the four Geneva Conventions of 1949 or with violating Common Article 3. Thus, the authorities relied upon by the government to show that some acts of terrorism may be war crimes are completely immaterial as applied to Mr. Khadr.

(6) Moreover, the specific acts of terrorism punishable under the law of war consist of conduct intended to inflict terror on the civilian population in the context of an ongoing armed conflict with the hope of preventing hostile acts[2] – not acts of political terrorism against which the MCA offense of terrorism is aimed. As professor Michael Schmitt explains:

> [A]n offense of terrorism, as it is generally understood in common parlance (characterized as having some political purpose or aspect), does not appear in the law of armed conflict. Rather, in the law of armed conflict, the term "terror" refers only to acts that have the specific intent to intimidate the population *in the context of an ongoing armed conflict.* Most significantly, Article 33 of the Fourth Geneva Convention provides that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited." The Official Commentary indicates that this article refers to "restoring to intimidatory measures to terrorize the population" in the hope of preventing hostile acts by them.[3] Since the Fourth Geneva Convention applies only to situations of occupation, the intent is to preclude acts by the occupying force intended to cow the civilian population into submission. It, in no way, is meant to address acts of political terrorism such as those committed by al Qaeda.
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> [] The prohibition also appears in both Additional Protocols to the Geneva Conventions. Article 51(2) of Protocol I provides that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." In the context of non-international armed conflict, Articles 4 and 13 set forth essentially the same prohibitions. The United States is a Party to neither of these treaties. But this point aside, the intent is, again, to encompass acts specifically intended to intimidate the population during an ongoing armed conflict, not acts intended to alter government positions or otherwise reflective of a "political" purpose.

Schmitt Aff. ¶¶ 28-29 (Attachment A)[4].

(7) The government cites a number of conventions for the proposition that "the prohibitions of terrorism under international law extend beyond the Geneva Conventions and the

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[2] International Committee of the Red Cross, Commentary on the Geneva Convention Relative to the Protection of Civlian Persons in Time of War 226 (Jean Pictet ed. 1958).

[3] *Id.*

[4] The defense is citing this affidavit for no other proposition than the one mentioned above in the text.

Hague Conventions." (Govt. Resp. at 9.) First, the argument is completely beside the point – the government does not claim that these conventions establish that terrorism is a war crime. Indeed, as the government appears to recognize, they establish quite the contrary. Not one of these instruments states or suggests that terrorism is a "war crime" or that terrorism-related offenses should be punished by military tribunals. Moreover, these instruments do not, as the government intimates, make terrorism punishable as an offense against "international law." These treaties generally impose obligations on states parties to make terrorism-related activities offenses punishable under their domestic criminal law. This, the United States has done. *See, e.g.,* Terrorist Bombings Convention Implementation Act of 2002, 107 P.L. 197, 116 Stat. 721 (amending 18 U.S.C.S. § 2332f to comply with U.S. obligations under the International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249). The government's invocation of these instruments actually makes the point the defense made in its opening brief and is consistent with the authorities cited therein, which demonstrate that the U.S. has consistently taken the position that terrorism should not be included amongst crimes against international law or the law of armed conflict, but rather should be punished exclusively under domestic law. (Def. Mot. at 4-5.) Nothing to which the government cites indicates that terrorism is a crime punishable under "international law" as such, let alone an offense against the law of war.

(8) The government also cites several United Nations Security Council Resolutions, claiming they "condemned al Qaeda's actions as war crimes." (Govt. Resp. at 10 para. 6(B)(v)(b)-(c).) While some of the resolutions refer to al Qaeda's activities as terrorism, none of them concludes that al Qaeda's activities are war crimes. Moreover, whether al Qaeda's activities years before Mr. Khadr is alleged to have conspired with "members and associates" of al Qaeda are war crimes is irrelevant as Mr. Khadr is not charged with committing any of them; the charged 2-month conspiracy is alleged to have existed long after these acts were committed.

(9) The government then embarks on a long discussion of how guerrilla fighters were subject to summary execution in the 1800s for nothing more than joining the group of fighters.[5] (Govt. Resp. at 11-14.). From this discussion, the government reaches the stunning conclusion that summary execution of guerilla fighters supports a finding that terrorism, as such, violates present-day law of war. The sources cited by the government, however, reveal that the combatants were summarily executed due to their status, not anything they might have done.[6] (*See* Govt. Resp. at 11-12.) These sources say nothing about whether terrorism, as such, was once a violation of the law of war nor whether terrorism, as such, violates the law of war today. Indeed, the law of war has evolved significantly since the early 20th-century, as norms of civilized conduct and modes of warfare have changed. For example, although summary execution might once have been routinely permitted under the laws of war, *see* Winthrop, *Military Law and Precedents* 783 (1895, 2d ed. 1920), the modern day law of war *clearly* prohibits such inhumane treatment. *See* Geneva Convention (III) Relative to the Treatment of

[5] The government also contends that these guerilla fighters did not "enjoy the full benefit of the law of war" (Govt. Resp. at 11) – a point that is irrelevant to the issue of whether terrorism, as such, violates the law of war.

[6] Modern day law of war does not recognize status offenses. *See* argument and authorities cited in Mr. Khadr's Motion to Dismiss Charge I at 5-6 and his corresponding Reply Brief at 3-6, D008.

Prisoners of War art. 3 (entered into force Oct. 21, 1950). In enacting Article 21 of the UCMJ, and its predecessor, Article 15 of the Articles of War, Congress intended only to preserve what jurisdiction existed under the law of war as it had evolved. *Hamdan*, 126 S.Ct. at 2774; *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (noting that a claim under the Alien Tort Claims Act "must be gauged against the *current state of international law*" (emphasis added)). Many of the international community's most prominent treaties were adopted in the latter half of the twentieth-century, and it defies both law and common sense to suggest that conduct violates present-day law of war simply because that conduct may have violated the law of war as it was understood two hundred years ago.

(10) Finally, the government contends that it need not establish that terrorism, as such, violates the law of war because the charge of conspiracy to support terrorism is supported by specific allegations. (Govt. Resp. at 14, para. 6(B)(iv)(a).) But none of those specific allegations allege an act of terrorism that violates the law of war. For example, in support of this argument, the government points to the allegation that Mr. Khadr "attended al Qaeda training camps." (*Id*.) Yet the government cites no authority supporting its argument that receiving training amounts to an act of that violates the law of war.[7] (*See* Govt. Resp. at 9, paras. 6(B)(iv)(d), 6(B)(vii)(a).) Indeed, the government has charged this conduct as material support for terrorism – not terrorism. *See* Charge Sheet.

(11) In the absence of *any* precedent that terrorism, as such, violates the law of war, it is hard to see how the government can conceivably be deemed to have met its burden of demonstrating a "plain and unambiguous" basis for the prosecution of conspiracy to commit terrorism as a war crime based on conduct alleged to have occurred in 2002.

b. The MCA Cannot Conclusively and Retroactively Determine the Content of the Law of War

(1) The prosecution cites *Hamdan* for the dubious proposition that the Court "invited the politically accountable branches" to pass an *ex post facto* law making terrorism and conspiracy to commit terrorism retroactively triable by military commission. In support of this notion, the prosecution selectively cites Justice Breyer's statement that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring), emphasizing the word "[n]othing." (Govt. Resp. at 10.) But, of course, Justice Breyer did not give Congress or the Executive authority to disregard the Constitution. The prosecution omits Justice Breyer's complete statement of his views: "If Congress, after due consideration, deems it appropriate to change the controlling statutes, *in conformance with the Constitution and other laws*, it has the power and prerogative to do so." *Hamdan*, 126 S. Ct. at 2800 (Breyer, J., concurring) (emphasis added). The President is free to

[7] Not only does the alleged training not violate the law of war, but it did not violate U.S. law at the State Department has explained, "[M]any of the people in Guantanamo had never set foot in the United States, had trained in al Qaeda training camps in Afghanistan and were captured there. And while they were training in acts of terrorism, there may have been an Egyptian or a Pakistani who would come to train. They had not committed crimes that were in violation of our U.S. criminal laws because those were not crimes that were on our books at the time in September 11, 2001." Foreign Press Center Briefing With State Department Legal Advisor John Bellinger, Federal News Service, Sept. 7, 2006.

"seek"—and Congress is free to grant— the authority the President believes is necessary, but only within the bounds of the Constitution. While Congress may be able to give the President the authority to make terrorism and conspiracy to commit terrorism triable by military commission as to future offenses, that does not mean it can give him the authority to make triable by military commission alleged conduct that occurred long before the MCA was enacted.

(2) Just as the Congress cannot give the President the authority to retroactively make terrorism and conspiracy to commit terrorism triable by military commission, it also cannot retroactively change the content of international law. Nonetheless, the prosecution relies primarily on the argument that terrorism was an offense punishable under the law of war prior to the date of the MCA's enactment because Congress has said so. (Govt. Resp. at 4-6.)

(3) This argument is wholly without merit. Initially, as Mr. Khadr explained in his opening brief, the best interpretation of the MCA is that it is not intended to apply retroactively to newly minted crimes. (*See* Def. Motion at 5-7.) The MCA's declaration that it "does not establish new crimes" simply confirms this intent that the MCA not apply retroactively. To the extent that Congress erroneously believed that terrorism and conspiracy to commit terrorism were offenses triable by military commission prior to the MCA's enactment, the appropriate response is not to read the MCA as purporting (absurdly) to retroactively change the content of the law of war *as of four years ago* by Congressional fiat, but rather to read the inadvertently new offenses as applying only to conduct that occurred after the enactment of the MCA.

(4) In any event, even if the MCA purported to retroactively declare the content of international law, it is clear that Congress cannot do so. The law of war is—and always has been—based on international law, and Congress has no power to conclusively determine what is and is not a violation of international law. *See Hamdan*, 126 S. Ct. at 2780 (plurality op.) (for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally" (quoting *Ex Parte Quirin*, 317 U.S. at 30)); *see also The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.").

(5) To the extent that the Government is suggesting that the Congress can conclusively determine the content of the law of war as part of its authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10 (emphasis added), that is simply not the case. Congress only has the power to clarify the exact scope and elements of offenses that have been previously recognized as violations of the law of war by international sources. It has no authority to *create* violations of law that the international sources do not recognize. Indeed, the Government's argument is belied by one of the principal sources on which the Government itself relies. As explained in the 1865 Attorney General opinion to which the Government cites, "[t]o *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations." 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, *4 (*cited in* Govt. Resp. at 7 (describing the opinion as "binding on the Executive Branch")). In other words, Congress is not itself empowered to *create* war crimes, but rather has only the "second-order authority to assign

more definitional certainty to *those offenses already existing under the law of nations* at the time it legislated." Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 141 (2007) (emphasis added).

(6) Similarly, Congress cannot use its "define and punish" power to simply label any existing crime an offense against the law of nations: "Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress." *United States v. Arjona*, 120 U.S. 479, 488 (1887). In *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), the Supreme Court rejected Congress's attempt to assert jurisdiction over certain acts of murder simply by describing them as violations of the law of nations. Whether there is sufficient evidence to establish an offense as a violation of the law of nations is ultimately a judicial question that must be answered in relation to recognized sources of international law; the "define and punish" power does not confer upon Congress the unilateral authority to make such a determination. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Congress's attempt in the MCA to "say what the law is" violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

(7) Accordingly, the fact that Congress may have—four years after the fact—declared terrorism to be a violation of the law of war at the time of the charged conduct is irrelevant, because the judiciary has an independent obligation to determine the content of the law of war based on international law sources. Those sources simply do not support the government's claim that terrorism and conspiracy to commit terrorism are offenses against the law of war.

c. The MCA Cannot Be Retroactively Applied to Mr. Khadr's Case

(1) Because Congress cannot conclusively determine the state of international law at the time of Mr. Khadr's alleged offenses, and because international law did not proscribe terrorism or conspiracy to commit terrorism at that time, this commission has jurisdiction only if the MCA—which was not passed until four years *after* Mr. Khadr's alleged offenses—can be applied in this case. But retroactively applying the MCA to Mr. Khadr would violate both U.S. and international law prohibitions on *ex post facto* legislation.

(2) Initially, as noted above, and as explained in detail in Mr. Khadr's opening brief, the best interpretation of the MCA is that it is not intended to apply retroactively. Accordingly, applying standard principles of statutory interpretation and constitutional avoidance, this commission should read the MCA's terrorism offense as applying only to conduct that occurred after the enactment of the MCA.

(3) In any event, the MCA could not be applied retroactively because doing so would violate the *Ex Post Facto* Clause of the U.S. Constitution and international law. In an effort to evade the constitutional prohibition on *ex post facto* legislation, the prosecution argues that the

Constitution "does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr." (Govt. Resp. at 15.) But the *Ex Post Facto* Clause is a structural limitation on congressional power. *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981) (the *Ex Post Facto* Clause acts as a restriction on congressional power "by restraining arbitrary and potentially vindictive legislation," and "confin[es] the legislature to penal decisions with prospective effect"). It governs Congress's conduct regardless of whether the individuals adversely affected have independent legal rights under the Constitution. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."); *see also Weaver*, 450 U.S. at 29-30 ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition."). Even the previous military commission system recognized that individuals could not be tried with offenses that did not exist when they were allegedly committed. MCI No. 2 ¶ 3(A) ("No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."). Accordingly, the *Ex Post Facto* Clause prohibits the retroactive application of the MCA regardless of where the individuals affected by it are detained.

(4) But even assuming, *arguendo*, that the *Ex Post Facto* Clause only applies to those persons detained within the territorial jurisdiction of the United States, it would still apply in this case because the Supreme Court has recognized that Guantanamo Bay is within the "territorial jurisdiction" of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base.") (citing the terms of the 1903 lease agreement); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.") (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).

(5) The government next argues that there is no *ex post facto* violation because Mr. Khadr could have foreseen the consequences of his conduct in 2002 because the President issued Military Commission Order No. 1 on November 13, 2001. (Govt. Resp. at 15-16.) Setting aside the fact that *Hamdan* found the order to be illegal, the President's order did not purport to criminalize any of the alleged conduct. And Military Commission Instruction No. 2, purporting to list offenses triable by military commission, was not issued until April 30, 2003. In any event, while lack of fair notice is a concern of the Ex Post Facto Clause, it is not necessary to find an *ex post facto* violation.

(6) In an effort to limit the reach of the Constitution's prohibition on *ex post facto* legislation, the prosecution relies heavily on the D.C. Circuit's opinion in *Boumediene v. Bush*, 476 F.3d 981 (2007), currently on review at the Supreme Court. While the prosecution argues that *Boumediene* "unambiguously holds that the Constitution does not apply to alien enemy combatants held" at Guantanamo, (Govt. Resp. at 8), *Boumediene* did no such thing. *Boumediene* was concerned solely with the Suspension Clause of the Constitution, and did *not* address the applicability of the *Ex Post Facto* Clause to Guantanamo detainees. To the extent *Boumediene* may have suggested that other constitutional provisions do not apply at Guantanamo, it did so only by dismissing the significance of the Supreme Court's recent

precedent in *Rasul*. *See Boumediene*, 476 F.3d at 991 n.10 (concluding that *Rasul*, "resting as it did on statutory interpretation, . . . could not possibly have affected the constitutional holding of" *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), which held that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction"). In rejecting the Supreme Court's conclusion that aliens at Guantanamo are within the "territorial jurisdiction" of the United States, the D.C. Circuit unnecessarily manufactured a tension between *Eisentrager* and *Rasul*. It is far more natural to read *Eisentrager* as setting out the standard for the extraterritorial application of constitutional rights and *Rasul* as recognizing that Guantanamo satisfies that standard.

(7) Moreover, the holding of *Boumediene* has already been called into question—first by the Supreme Court's grant of certiorari and second by the D.C. Circuit's own decision to recall the mandate it had previously issued. Under the Federal Rules of Appellate Procedure, an appellate decision "is not final until issuance of the mandate." Advisory Committee Notes, subdivision (c), Fed. R. App. P. 41. Numerous judges have recognized that "the Court of Appeals' withdrawal of the mandate in *Boumediene*," when considered along with "the Supreme Court's highly unusual grant of certiorari on rehearing," casts "a deep shadow of uncertainty over the jurisdictional ruling of that decision." *Alhami v. Bush*, No. 05-359, at 6 (GK) (D.D.C. Oct. 2, 2007); *see also Al-Oshan v. Bush*, No. 05-0520, at 6 n.2 (RMU) (D.D.C. Oct. 5, 3007) (noting that "the extraordinary procedural dispositions in *Boumediene* 'cast a deep shadow of uncertainty'" over the D.C. Circuit's jurisdictional ruling).

(8) Given the considerable uncertainty surrounding *Boumediene*, if this Commission were to find that the D.C. Circuit's opinion is necessary to the resolution of this case, it should stay these proceedings until the Supreme Court reaches a decision. Several D.C. district court judges have stayed their proceedings and refused to rule on Government motions to dismiss detainee habeas petitions in light of the considerable uncertainty surrounding *Boumediene*. *See Maqaleh v. Gates*, No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct. 5, 3007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct. 2, 2007).

(9) Alternatively, if this Court should decide that it can now reach the merits of the *Ex Post Facto* issue, it should determine that applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause. Indeed, the Government's throwaway claim that summary execution is the proper baseline for determining the extent to which application of the MCA disadvantages Mr. Khadr implicitly reflects a recognition that the MCA, when compared against the proper baseline, violates the prohibitions of the *Ex Post Facto* Clause. (Govt. Resp. at 16). Only such an absurd baseline would make the MCA look good in comparison.

(10) In short, trying Mr. Khadr for conspiracy to commit terrorism violates the *Ex Post Facto* Clause because it makes criminal an action that "was innocent when done before the passing of the law . . . , criminal, and punishes such action." *Calder v. Bull*, 3 U.S. 386, 390-91 (1798); *see also Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Congress cannot retroactively change the "criminal quality attributable to an act").

d. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized terrorism or conspiracy to commit terrorism as part of the narrow category of crimes triable by military commission at the time the charged conduct in this case is alleged to have occurred.

(2) Unable to meaningfully contest that point, the prosecution attempts to base this Commission's jurisdiction on the MCA, arguing that the MCA can conclusively establish that international law did proscribe terrorism at the time of the charged conduct or that its determination terrorism is triable by military commission as a matter of U.S. law can be retroactively applied to Mr. Khadr. Both arguments are without merit. The Congress cannot dictate the content of international law, and it certainly cannot do so retroactively. Nor can it retroactively make terrorism or conspiracy to commit terrorism triable by military commission as a matter of U.S. law because to do so would violate the structural limitations on Congress's power imposed by the *Ex Post Facto* Clause.

(3) Accordingly, military commissions do not have jurisdiction to try Mr. Khadr for conspiracy to commit terrorism. Thus, terrorism should be struck as an object of the conspiracy alleged in Charge III.

5. **Witnesses and Evidence:** Schmitt Affidavit.[8]

6. **Attachment:**

A. Schmitt Affidavit

Rebecca S Snyder

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

[8] The defense is citing this affidavit for no other proposition than the one mentioned in the text on page 3 of this Reply.

AFFIDAVIT

I am **Michael N. Schmitt**, Professor of International Law and Director of the Program in Advanced Security Studies at the George C. Marshall European Center for Security Studies, a US-German educational institution sponsored jointly by the Department of Defense and German Ministry of Defense. A retired USAF Judge Advocate who has served on the faculties of the United States Air Force Academy and the United States Naval War College, my publications include over 60 articles and edited books, the vast majority dealing with international law, in particular the law of armed conflict. Professional affiliations include the Lieber Society of the American Society of International Law (Member, Executive Board), the International Law Association, and the International Society for Military Law and the Law of War. In 2002, I was elected a Member of the International Institute of Humanitarian Law, and I currently serve on the Steering Committee of Harvard's International Humanitarian Law Research Initiative and on the Board of Editors of the International Review of the Red Cross. I have been involved as an "International Expert" in numerous projects seeking to clarify the law of armed conflict. Currently, I am participating in such projects with regard to non-international armed conflict (Institute of Humanitarian Law), aerial warfare (Harvard), and participation by civilians in hostilities (International Committee of the Red Cross). My academic degrees include an LL.M from Yale Law School, a JD from the University of Texas, an MA in National Security and Strategic Studies from the Naval War College, and an MA and BA from Texas State University.

I have been asked to comment on law of armed conflict (a term synonymous with "law of war" and "humanitarian law") issues related to the case of Mr. David Matthews Hicks.

Sources of International Law

1. The accepted sources of international law are set forth in Article 38 of the Statute to the International Court of Justice:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law; [and]
   c. the general principles of law recognized by civilized nations.[1]

As the law of armed conflict is a sub-category of international law, it is derived from such sources.

2. Conventions formally bind only parties thereto. However, certain provisions of various law of armed conflict conventions are characterized as also reflecting customary law, and are thereby binding even on non-Parties. For instance, the United States views much of the 1977 Additional Protocol I to the 1949 Geneva Conventions, to which it is

[1] Statute of the International Court of Justice, art. 38.1(a-c) [ICJ Statute].

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not a Party, as accurately restating the customary international law of armed conflict. Customary international law of armed conflict emerges from "the practice of military and naval forces" during armed conflict. "When such practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with the practice is obligatory, it can be said to have become a rule of customary law binding on all nations."[2]

3. War crimes (in international armed conflict) derive from either treaties or customary law (or both); they consist of "grave breaches of the Geneva Conventions of 12 August 1949" and "other serious violations of the law and customs applicable in international armed conflict, within the established framework of international law."[3] The application of the law of armed conflict is further informed by "general principles of law recognized by civilized nations."[4] For instance, Part 3 of the Statute of the International Criminal Court sets forth such general principles of criminal law as *nullum crimen sine lege*[5] and the accepted grounds for individual criminal responsibility.[6]

4. Article 38 goes on to note that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are "subsidiary means for the determination of rules of law."[7] Thus, in international law, judicial decisions are persuasive, not binding, authority used in identification and interpretation of law. The written works of publicists (scholars) are also referred to for the same purposes.

Commencement of an Armed Conflict

5. The law of armed conflict only applies during times of "armed conflict." This term has replaced "war" as the legal term of art referring to hostilities. Thus, phrases such as "state of war" are *descriptive* (factual), not *juridical* (legal), in nature.

6. There are two categories of armed conflicts, *international* and *non-international* (internal). Since different parts of the law of armed conflict apply to each, it is essential to distinguish between the two. For instance, the laws regarding detention of combatants during an international armed conflict contained in the Third Geneva Convention do not apply during a non-international armed conflict. On the contrary, human rights law governs detention much more prominently during such conflicts. In any event, as

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[2] United States Navy, The Commander's Handbook on the Law of Naval Operations (NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1), October 1995, para. 5.41. The Handbook is the "law of war manual" for the United States Navy, Marine Corps, and Coast Guard.

[3] Statute of the International Criminal Court, art. 8.2(a-b).

[4] Statute of the International Court of Justice, art. 38(c). Such principles must be accepted by the community of nations. Thus, a principle of criminal culpability such as conspiracy would not be a general principle of law because it is not used in civil law countries (see discussion below).

[5] No crime without a law authorizing it. In other words, an individual may not be held criminally except for crimes over which the court has jurisdiction.

[6] Statute of the International Criminal Court, art. 25.

[7] ICJ Statute, art. 38.1(d)

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explained below, no armed conflict of either sort began in Afghanistan until October 7, 2001. Moreover, none of the specific offenses charged against Mr. Hicks appears, as such, in either the law of international armed conflict or the law of non-international armed conflict.

A. International Armed Conflict

7. International armed conflict requires a conflict between States (non-State actors can be involved, but there must be at least one State on either side). The widely accepted definition of war (which today is called an "international armed conflict" in international law) is that proposed in the classic treatise, *Oppenheim's International Law*: "War is a contention *between two or more States* through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."[8] In the context of the "global war on terror," the most significant of the constituent elements comprising this definition of international armed conflict is that requiring conflict between two or more sovereign States. This requirement is well established in mainstream international law.[9]

8. The requirement that States be on either side of the battlefield is included in each of the five core instruments setting forth the law of international armed conflict – the four 1949 Geneva Conventions and the 1977 Protocol Additional I to those instruments. Article 2 common to each of the Geneva Conventions provides that they apply, aside from several provisions that specifically pertain in peacetime, "to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them." The 1977 Protocol Additional I, which like the Conventions pertains to international armed conflict, adopts the same "armed conflict" standard.[10]

9. The Official Commentaries to these instruments, although not an express source of law themselves, further confirm the prerequisite of State participation in hostilities before they can be characterized as an international armed conflict. Those on the Geneva Conventions define armed conflict as "[a]ny difference arising *between two States* and leading to the intervention of armed forces… even if one of the Parties denies the existence of a state of war."[11] Similarly, the Commentary to Additional Protocol I

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[8] OPPENHEIM, II INTERNATIONAL LAW 202 (Hersch Lauterpacht ed., 7th ed. 1952).

[9] Indeed, as Professor Yoram Dinstein has authoritatively commented, "[o]f the four ingredients in Oppenheim's definition of war, only the first can be accepted with no demur." YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENSE 5 (3d ed. 2001).

[10] Article 1.

[11] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 32-33 (Jean Pictet ed. 1952) [hereinafter GC I Commentary].

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specifies that "humanitarian law… covers any dispute *between two States* involving the use of their armed forces."[12]

10. Case law is supportive. For instance, the International Criminal Tribunal for the Former Yugoslavia held in the *Tadic* case that an international armed conflict "exists whenever there is a resort to armed force *between States*."[13] The Appeals Chamber subsequently confirmed this position in its judgment: "It is indisputable that an armed conflict is international if it takes place between two or more States."[14] Finally, there is broad consensus among international law scholars that State involvement on both sides of a conflict is a *sine qua non* of international armed conflict This requirement certainly reflects customary international law.

11. Applying this law to the circumstances of this case, an international armed conflict only began on October 7, 2001, the date Coalition forces commenced military operations against Afghanistan. Those operations were legal as an exercise of the right of self-defense (see discussion below), a right that had existed before October 7th (and in my view well before that date given al Qaeda attacks against US targets stretching back nearly a decade). But it was only on October 7th that the law of armed conflict became operative because it was only then that the armed forces of one State engaged those of another.

12. In my opinion, the international armed conflict in Afghanistan became a *non*-international armed conflict (see below) no later than June 2002, when the Transitional Authority under President Harmid Karzai was created following conclusion of the Emergency Loya Jirga. The Security Council, including the United States, formally recognized the legitimacy of this government in Resolution 1419 of 26 June 2002.[15] Since there are no longer States on either side of the conflict, the continued hostilities in Afghanistan can no longer be characterized as an international armed conflict.

13. Sometimes, the concept of *international armed conflict* is confused with that of *self-defense*, an inherent right of States in international law, recognized in Article 51 of the

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[12] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds. 1987), at para. 62.

[13] ICTY, Appeals Chamber, (decision on the defence motions for interlocutory appeal on jurisdiction), *Tadic*, IT-94-1-AR72, para. 70.

[14] ICTY, Appeals Chamber, Judgment, *Tadic*, IT-94-1-A, para. 84.

[15] Arguably, the conflict became non-international during the period of the Afghan Interim Authority because the conflict had become internalized, with Coalition forces serving to assist the Interim Authority. See, e.g., UNSC Res. 1386 (December 2001) (regarding ISAF operations in Afghanistan and recognizing that "the responsibility for providing security and law and order throughout the country resides with the Afghans themselves"). See also UNSC Res. 1413 (May 2002) which also confirmed that the Afghan people bore responsibility for security in the country. But in any event, by June 2002, the conflict in Iraq had become internal.

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United Nations Charter.[16] It is essential that the difference between the two be understood clearly. In the aftermath of the September 11 terrorist attacks, there is no question that the right of self-defense extends to armed attacks committed by non-State actors, such as terrorists.[17] That this is an accepted interpretation of Article 51 is evidenced by the many offers of collective defense (assistance to the United States in defending itself from terrorists) from individual States and from security organizations such as NATO, as well as a string of UN Security Council resolutions either directly citing the right of self-defense with regards to the attacks, or reaffirming earlier resolutions that did so.[18]

14. But one must be careful not to read too much into those acts and documents. They are relevant to the existence of the right to *self-defense*, not an *international armed conflict*. Similarly, the Authorization to use Military Force passed by Congress a week after the attacks was entirely consistent with the exercise by the United States of its right to *self-defense*; it has however, it does not establish the existence of an *international armed conflict* such that the law of armed conflict began to apply.[19] Suggestions to the contrary confuse these two very distinct legal concepts.

15. Of course, at times the concepts of self defense and international armed conflict are related. For instance, an armed attack by State A on State B clearly triggers the right to self-defense and, *because two States are involved*, the law of international armed conflict. Yet if a non-State actor mounts the attack, the law of armed conflict is *not* activated, even though the right to self-defense using military force matures. In such cases, other aspects of domestic and international law become operative (most notably, human rights law and the domestic criminal law of the victim State).

16. Finally, it has been suggested that certain statements by US government officials and other Coalition leaders constitute a "declaration of war" on al Qaeda. In some cases, a

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[16] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." UN Charter, art. 51.

[17] Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MILITARY LAW REVIEW 364-421 (2003), 16th Annual Waldemar A. Solf Lecture, U.S. Army Judge Advocate General's School.

[18] Most significantly, Resolution 1368 was issued the very day after the attacks. In preambular language, it specifically reaffirmed the "inherent right of self-defense as recognized by the Charter of the United Nations." Two weeks later, the Council did so again in Resolution 1373. Both resolutions came at a time when no one was pointing to the possibility that the attacks might have been the work of a State. Both were reaffirmed in multiple subsequent resolutions, including resolutions adopted after the Coalition operations began on October 7th.

[19] Authorization to Use Military Force, 115 Stat. 224.

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"declaration of war" may indeed create a state of international armed conflict. None of the pronouncements made by President Bush or other Coalition leaders would qualify as such. This is because it is meaningless as a matter of law to "declare war" (technically international armed conflict) on an entity that cannot be the other Party in an international armed conflict. Hostilities with a non-State actor, absent related hostilities with a State, cannot trigger international armed conflict.

B. Non-international Armed Conflict

17. Non-international armed conflict is a legal term of art referring to armed conflicts that are internal in nature. The laws of non-international armed conflict (a component of the "law of armed conflict") are set forth in the Common Article 3 to the 1949 Geneva Conventions, the 1977 Protocol Additional II to the Geneva Conventions (the United States is not a Party to this treaty), and customary international law (the content of customary law in a non-international armed conflict is a matter of some controversy). Even if a non-international armed conflict continues in Afghanistan, it is only this component of international law, not the law of *international* armed conflict that applies. Because the two types of conflict implicate different bodies of law, it is essential to distinguish between them. As noted above, none of the offenses charged against Mr. Hicks, as such, are war crimes under the law of non-international armed conflict. Indeed, the law of non-international armed conflict is much less developed than the law of international armed conflict. For this reason, prosecution for acts committed during a non-international armed conflict generally occurs in domestic courts applying domestic law.

18. At least as important, prior to October 7, 2001, there was not a non-international armed conflict involving the United States in Afghanistan, just as there was no international armed conflict. Suggestion that the attacks of September 11th *began a non-*international armed conflict between the United States and the al Qaeda terrorist organization (and that the law of non-international armed conflict was thereby activated) are simply wrong. The vast majority of legal scholars are in accord on this issue. Common Article 3 to the Geneva Conventions, considered the lowest threshold for non-international armed conflict (Protocol Additional II add criteria), refers to "cases of non-international armed conflict occurring in the territory of one of the High Contracting Parties." The Official Commentary makes clear that non-international armed conflict involves an *intra*-State conflict by suggesting the following criterion when ascertaining whether a conflict is non-international: "That the party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having means of respecting and ensuring respect for the Convention."[20]

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[20] GC I Commentary at 49.

19. Case law supports this interpretation. For instance, the International Criminal Tribunal for Rwanda, a Tribunal dealing exclusively with such conflicts, in the case of *Akayesu* and citing with approval the decision of the Appeals Chamber in the ICTY case of *Tadic*, stated that "an armed conflict exists whenever there is [...] *protracted violence* between *governmental authorities and organized armed groups* or between such groups within a State."[21] In *Rutaganda*, the same tribunal noted that "[C]onflicts referred to in Common Article 3 are armed conflicts with *armed forces* on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international conflict, but takes place *within the confines of a single country*."[22] And in *Musema*, it stated that "The expression 'armed conflicts' introduces a material criterion: the existence of *open hostilities between armed forces which are organized* to a greater or lesser degree. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a *single* State."[23] The International Criminal Court Statute, in a provision to which the United States does not object, takes the same approach.[24]

20. It is clear that a transnational terrorist organization operating from scores of countries, with a membership of many nationalities, loosely organized, having lawlessness as it purpose, and attacking States, organizations, and individuals scattered across the globe is not the type of armed group meant in the law of non-international armed conflict.

21. In sum, terms such as "the war on terror" are effective and useful rhetorical devices to mobilize the American people and the nation's resources, and to strengthen our resolve in the face of transnational terrorism. But the term "war" is being used in a lay, not legal, sense, in the same manner as "War on Poverty," "War on Drugs," and so forth. War is an issue of fact and law, not pronouncements. No armed conflict began until October 7, 2001, and the international armed conflict between the United States and Afghanistan had ended by June 2002. Al Qaeda attacks proceeding October 7, 2001, and any post-

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[21] See ICTR, *Akayesu*, (Trial Chamber), September 2, 1998, paras. 619-621, 625.

[22] ICTR, *Rutaganda*, (Trial Chamber), December 6, 1999, para. 170.

[23] ICTR, *Musema* (Trial Chamber), January 27, 2000, paras. 247-248.

[24] Statute of the International Criminal Court, art. 8.2(f).

[25] Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MILITARY LAW REVIEW 364-421 (2003), 16th Annual Waldemar A. Solf Lecture, U.S. Army Judge Advocate General's School.

[26] Most significantly, Resolution 1368 was issued the very day after the attacks. In preambular language, it specifically reaffirmed the "inherent right of self-defense as recognized by the Charter of the United Nations." Two weeks later, the Council did so again in Resolution 1373.67 Both resolutions came at a time when no one was pointing to the possibility that the attacks might have been the work of a State. Both were reaffirmed in multiple subsequent resolutions, including resolutions adopted after the Coalition operations began on October 7th.

[27] Authorization to Use Military Force, 115 Stat. 224.

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October 7 actions without a clear direct link to the armed conflict in Afghanistan, constituted neither an international, nor non-international, armed conflict.

The Charges

A. Conspiracy

22. Charge 1 against the accused is the inchoate offense of conspiracy. In international criminal law, however, conspiracy is neither an inchoate offense, nor the basis for individual criminal responsibility for a separate war crime. There are but two exceptions: crimes against peace (aggression) and genocide, neither of which constitutes a war crime per se. The limited acceptance of conspiracy derives from the fact that most civil law countries (e.g., continental European in contrast to common law jurisdictions such as the United States and United Kingdom) do not recognize the offense in their domestic criminal law systems.[28] Instead, they focus on complicity, or participation, in an actual crime or attempt.[29] Thus, any attempt to support the existence of a crime of conspiracy through reference to common law cases is misleading. On the contrary, the very fact that the offence is recognized in common law jurisdictions, but not in civil law systems, supports its non-inclusion in international criminal law. Note that I am describing the law of armed conflict as it exists in contemporary practice; to the extent such an offence existed historically, it has long since faded away.

23. Application of conspiracy to international crimes occurred most prominently in the war crimes trials following the Second World War. Inclusion of the notion of conspiracy in the Charters of the various tribunals resulted from US influence during the drafting processes.[30] Article 6 of the Nuremberg Charter (1945) set forth the three crimes within the jurisdiction of the International Military Tribunal (IMT): crimes against peace, crimes against humanity, and war crimes.[31] The term "conspiracy" appeared only in the definition of the first: "…planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or *conspiracy* for the accomplishment of the foregoing." Although a non-specific reference to conspiracy was also contained in the article ("*conspiracy* to commit *any* of the foregoing crimes"), the Tribunal limited application to crimes against peace. Of the 22 defendants, each was charged with conspiracy to commit crimes of peace; eight were convicted of the offence.[32]

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[28] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 191 (2003).

[29] WILLIAM A. SHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 103 (2nd ed. 2004).

[30] CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 8 (2003).

[31] The principles set out in the Nuremberg Charter were confirmed as principles of international law by the U.N. General Assembly on December 11, 1946. Resolution Affirming the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. Doc. A/236 (1946).

[32] None were convicted on the conspiracy charge alone.

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24. Although the IMT captured the greater attention, most of the war crimes trials held after the war were conducted by the individual allies pursuant to Allied Control Council Law No. 10 (1945). That instrument, in Article II (d), only mentioned conspiracy *per se* with regard to crimes against peace.

25. By contrast, the Charter of the International Military Tribunal for the Far East (1946), in Article 5, followed the Nuremberg precedent in citing conspiracy vis-à-vis crimes against peace (Article 5a), but also included conspiracy in the definition of crimes against humanity (Article 5c). It contained no offense of conspiring to commit war crimes.[33]

26. Despite the explicit references to conspiracy in the three aforementioned instruments, and resulting convictions, subsequent international criminal law conventions have not included conspiracy to commit such crimes.[34] A sole exception in the context of armed conflict is conspiracy to commit genocide. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article III (b), renders "conspiracy to commit genocide" punishable. Other international instruments addressing criminal conduct during armed conflict incorporate the notion of conspiracy only with regard to genocide. The Statutes of the International Tribunal for the Former Yugoslavia (1993) (Article 4.3) and the International Tribunal for Rwanda (1994) (Article 2.3), for instance, both criminalize conspiracy to commit genocide as an inchoate offense, using precisely the same verbiage as the Genocide Convention. Indeed, the ICTR has issued numerous judgments dealing with the offense.[35] It should be noted that the Statute of the International Criminal Court (1998) does not follow the lead of its *ad hoc* counterparts, as it makes no reference to conspiracy at all. On the contrary, initial efforts to address conspiracy in the Statute were rejected on the basis that it does not represent a generally accepted principle of law. Thus, it is clear that modern international criminal law practice restricts the offense of conspiracy to cases of genocide, the most egregious international crime.

27. I would further note that of the underlying crimes that Mr. Hicks is alleged to have conspired to commit, only attacking civilians and civilian objects are war crimes *per se*. Murder by an unprivileged belligerent (see below), destruction of property by an

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[33] Of the 25 defendants convicted by the IMTFE, 23 were found guilty of conspiracy to wage a war of aggression. Again, this offense is a "crime against peace," not a war crime, and does not bear on this case.

[34] On the contrary, disagreement over the scope of even the *underlying* crime of aggression has precluded its inclusion in relevant instruments, with the exception of the Statute of the International Criminal Court, Art. 5.1(d). However, jurisdiction will only exist once the crime has been defined for the purposes of the Statute, something that is highly unlikely in the foreseeable future. *Id.*, art. 5.2.

[35] See, e.g., ICTR, *Musema,* (Trial Chamber), January 27, 2000; *Ntakirutimana and Ntakirutimana,* (Trial Chamber), February 21, 2003; *Niyitegeka,* (Trial Chamber), May 16, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003.

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unprivileged belligerent, and terrorism are *not* war crimes *as such* under the law of armed conflict.[36]

28. Since terrorism forms such an integral part of the case against Mr. Hicks, it is important to emphasize that an offense of terrorism, as it is generally understood in common parlance (characterized as having some political purpose or aspect), does not appear in the law of armed conflict. Rather, in the law of armed conflict, the term "terror" refers only to acts that have the specific intent to intimidate the population *in the context of an ongoing armed conflict*. Most significantly, Article 33 of the Fourth Geneva Convention provides that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited." The Official Commentary indicates that this article refers to "resorting to intimidatory measures to terrorize the population" in the hope of preventing hostile acts by them.[38] Since the Fourth Geneva Convention applies only to situations of occupation, the intent is to preclude acts by the occupying force intended to cow the civilian population into submission. It, in no way, is meant to address acts of political terrorism such as those committed by al Qaeda.

29. The prohibition also appears in both Additional Protocols to the Geneva Conventions. Article 51(2) of Protocol I provides that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." In the context of non-international armed conflict, Articles 4 and 13 set forth essentially the same prohibitions. The United States is a Party to neither of these treaties. But this point aside, the intent is, again, to encompass acts specifically intended to intimidate the population during an ongoing armed conflict, not acts intended to alter government positions or otherwise reflective of a "political" purpose.

30. Case law, albeit limited, is in accord with this position. Most significant in this regard is the judgment of the International Criminal Tribunal for the Former Yugoslavia in the *Galic* case, which has been *wrongly cited* as support for the existence of a war crime of terrorism in the law of armed conflict.[39] On the contrary, the Tribunal specifically *declined* to consider "political" terrorism, that is, the type of terrorism engaged in by al Qaeda.[40]

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[36] The labeled "crimes" potentially could encompass conduct that is in fact criminal. For instance, intentional destruction of civilian property is a war crime if it does not have a valid military objective, but whether the act was done by a lawful or unlawful combatant would be irrelevant.

[37] Military Commission Order No. 2, para. 6B(2).

[38] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 226 (Jean Pictet ed. 1958).

[39] ICTY, *Galic*, Judgment, Case No. IT-98-29-T (Dec. 5, 2003).

[40] The charge against General Galic was "unlawfully inflicting terror upon civilians" by commanding troops that indiscriminately shelled and sniped the civilian population of Sarejevo. In its judgment, the Tribunal expressly refused to consider what is commonly understood as terrorism (in, e.g., the September 11th sense). In a footnote, it specifically stated that: As stated in an earlier [sic], the Majority has not

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31. To summarize, there is no offense of "terrorism" in the law of armed conflict with regard to acts with a political purpose. Although such acts may in fact frighten the civilian population, political terrorism as such (e.g., the 1998 attacks against the two US embassies in East Africa, the 2000 attack on the USS Cole, the attacks of September 11th) is absent from the law of armed conflict.

32. In any event, regardless of the status of the underlying offenses that Mr. Hicks is alleged to have conspired to commit, there can be no doubt that conspiracy itself is not a crime under the law of armed conflict.

B. Attempted Murder by an Unprivileged Belligerent

33. The offense of murder by an unprivileged belligerent alleged in Charge 2 is likewise absent from the law of armed conflict, although the underlying conduct thereto could constitute an offense if the victim was either a civilian who had not lost his or her immunity from attack (through direct participation in hostilities)[43] or a combatant protected under the law of armed conflict, such as those who have surrendered or are otherwise *hors de combat*. However, in such cases, the status of the individual committing the act (assuming a nexus to the armed conflict) would be irrelevant; both military and civilian personnel can commit war crimes. Rather, it is the status of the *victim* as protected by the law of armed conflict that matters.

34. The specific conduct alleged is that Mr. Hicks attempted to murder combatants, i.e., "American, British, Canadian, Australian, Afghan, and other Coalition forces." Under the law of armed conflict, *combatants* enjoy no general protection from attack.[44] Rather, they are only protected from attack when they are *hors de combat* because they have surrendered,[45] are sick or wounded and not carrying on the fight,[46] are shipwrecked,[47] or

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considered it necessary to enter into discussion of "political" terrorist violence and of attempts to regulate it through international conventions." Id at fn. 222.

[42] *Id.* at fn 222.

[43] *See* Additional Protocol I, art. 51, which is accepted as customary law by the United States [hereinafter PI].

[44] No treaty (including the Statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia, and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful absent the special circumstances set forth.

[45] Regulations Annexed to the 1907 Hague Convention IV Respecting the laws and Customs of War on Land, art. 23 [HIVR]; PI, art. 41.

[46] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 12 [GCI]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949 [GCII], art. 12; PI, arts. 10, 42.

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have parachuted from a disabled aircraft.[48] They are also immune from attack when serving as *parlementaires* conducting negotiations with the enemy,[49] or as medical or religious personnel.[50] It should be noted that certain types of attacks on a combatant are wrongful not because of the victim's status, but rather because an unlawful method or means of warfare was employed. For instance, a general prohibition on using methods or means of warfare resulting in unnecessary suffering or superfluous injury exists,[51] as do restrictions on specific weapons (such as poison or blinding lasers[52]) and perfidious attacks.[53] If Mr. Hicks engaged in such activities, and they resulted in the death of a member of the Coalition forces, he would be guilty of a war crime. However, Charge II fails to allege any circumstances that, under the law of armed conflict, would render attack on combatants wrongful.

35. This being so, perhaps the reference to "unprivileged belligerent" in Charge 2 (it does not appear as such on its face) was meant to suggest that merely participating in an armed conflict without enjoying combatant status is a violation of the law of armed conflict. If so, such a position is incorrect as a matter of law.

36. There is but one law of armed conflict consequences of direct participation in an armed conflict. Civilians who "take a direct part in hostilities" lose the protection from attack they would otherwise enjoy pursuant to the law of armed conflict.[54] Thus, it is not a violation of the law of armed conflict for combatants to use force against civilians for such time as those civilians engage in hostile action.

37. However, because the unprivileged belligerent does not have combatant status (he remains a civilian), he or she does not enjoy the law of armed conflict immunity from prosecution for murder that a combatant has when killing either an enemy combatant or a civilian directly participating in the hostilities. This immunity from prosecution (together with prisoner of war entitlement) is the seminal benefit of lawful combatancy.

38. Absent such immunity, the unprivileged belligerent who kills a combatant is subject to prosecution for murder pursuant to the domestic law of States with subject matter jurisdiction over the offense and personal jurisdiction over the accused. There being no such crime under the law of armed conflict, domestic law offers the sole basis for

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[47] GC II, art . 12, PI, art. 10.

[48] PI, art. 42.

[49] HIVR, art. 32.

[50] GCI, art. 24, 25; PI, art. 15. Note that by Protocol Additional I, art. 43, these individuals are not combatants.

[51] St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868; HIVR art 23; PI, art. 35.

[52] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1980.

[53] HIVR, art. 23; PI, art. 37.

[54] PI, art 51.3.

prosecution. Although the distinction between the war criminal and the unprivileged belligerent (who may also be a war criminal if he violates the law of armed conflict) has at times proven confusing,[55] such a distinction is well-established in the law of armed conflict.[56] Indeed, the United States Army's *Operational Law Handbook*, a key source of guidance on law during military operations, specifically notes:

> [u]npriveleged belligerents may include spies, saboteurs, or civilians who are participating directly in hostilities or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may prosecuted under the domestic law of the captor.[57]

39. Simply put, it is not a violation of the law of armed conflict to kill a combatant, even when the individual doing so lacks the combatant privilege to use force. Neither is mere unprivileged belligerency a war crime.

C. Aiding the Enemy

40. Finally, there is no prohibition in the law of armed conflict on aiding the enemy. In the law of armed conflict, aiding the enemy is nothing more than a form of direct participation in hostilities. Indeed, some forms of "aiding the enemy" would not even rise to the level of direct participation by virtue of not being "direct enough" (insufficient nexus to the conduct of hostilities). Rather, acts amounting to aiding the enemy are treated in precisely the same manner as direct participation by a civilian in hostilities, i.e., the underlying conduct may only be considered by a judicial body to the extent personal and subject-matter jurisdiction lawfully exist in domestic law —unless that conduct amounts separately to a war crime.

41. That this is the appropriate treatment for direct participants is illustrated by the case of spies, who undoubtedly "aid the enemy" and, in many case, are directly participating in hostilities (and who the *Operational Law Handbook* groups with civilian who directly participate). Typical is the decision of the Dutch Special Court of Cassation in the 1949 *Flesche* case, "espionage…is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime

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[55] See, e.g., *Ex parte Quirin*, 317 US at 32. The Qurin decision has been criticized for its deviation from law of armed conflict principles by several top scholars and practitioners in the field. For instance, W. Hays Parks, the Law of War Chair, Office of the General Counsel, Department of Defense, has noted that "*Quirin* is lacking with respect to some of its law of war scholarship." *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003), at fn. 31.

[56] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 234 (2004); Richard. R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 1952 BRIT. Y.B. INT'L L. 323, *reprinted in* MIL. L. REV. (Bicentennial Issue) 487 (1975). See also, Derek Jinks, *The Declining Status of POW Status*, 45 HARV. INT'L L.J. 367, 436-439, who takes an even more permissive view of the issue.

[57] U.S. ARMY, JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK (2004), at p. 23.

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proper on the part of the individual concerned."[58] Commentators are in accord,[59] as are the military manuals such as those of the U.S. Army[60] and U.K. Forces.[61]

42. In summary, none of the offenses as charged constitutes a war crime under the law of armed conflict.

Michael N. Schmitt
1 November 2004

WITH THE UNITED STATES ARMY IN GARMISCH-PARTENKIRCHEN, GERMANY:

I, BARRY J. STEPHENS, the undersigned official, do hereby certify that the foregoing affidavit was subscribed and sworn before me this 1st day of November, 2004, by MICHAEL N. SCHMITT, whose home address is Garmisch-Partenkirchen, Germany, and who is known to me to be an individual accompanying, serving with, or employed by the Armed Forces serving outside the United States. I do further certify that I am, at the date of this certificate, a commissioned offficer in the United States Army in the rank or grade stated below, that by statute no seal is required on this certificate, and same is executed by me in that capacity.

BARRY J. STEPHENS
Major, U.S. Army Judge Advocate General's Corps
Legal Advisor, George C. Marshall Center

Authority: Title 10, United States Code, sections 936 and 1044a, and Army Regulation 27-55.

[58] Flesche (Holland, Special Court of Cassation, 1949) [1949] AD 266, 272 (see Dinstein, Conduct, at 211).

[59] Dinstein, Conduct of Hostilities, at 210, 213; Baxter, generally.

[60] Department of the Army Field Manual 27-10, The Law of Land Warfare, July 1956, para. 77 ("Resort to [espionage] involves no offense against international law").

[61] U.K. Ministry of Defence, The Manual of the Law of Armed Conflict (2004), para. 4.9.7 ("Spies are usually tried by civilian courts under the domestic legislation of the territory in which they are captured").

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Strike Surplus Language from Charge III 11 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 28 November 2007 scheduling order.

2. **Relief Requested:** The Defense respectfully requests that this Military Commission strike the following surplus language from Charge III, alleging conspiracy in violation of Section 950v(b)(28) of the Military Commissions Act of 2006 ("MCA"):

> and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States;

and

> and enterprise sharing a common criminal purpose known to the accused

3. **Overview:**

a. The MCA proscribes the offense of "conspiracy." MCA § 950v(b)(28). The term conspiracy has a well-established meaning and the terms of the offense are clearly set forth in the statute. In short, under the MCA, "conspiracy" consists of an agreement to commit an offense or offenses and an overt act done by the accused in furtherance thereof. *See id.* Nonetheless, in the Manual for Military Commissions (MMC), the Secretary of Defense has purported to define "conspiracy" to include "joining an enterprise of persons sharing a common criminal purpose." Whatever else it is, this is not conspiracy.

b. Based on this expanded and erroneous definition of the term conspiracy, the government has alleged, in support of Charge III, not only that Mr. Khadr "did conspire and agree" with various persons to commit a number of offenses triable by military commission, but that he "joined an enterprise of persons . . . sharing a common criminal purpose" as well. Though lacking in the requisite degree of particularly regarding the object offenses, language concerning an "agreement" appears to state an offense.[1] The additional language (relating to an

[1] This matter is the subject of a separate motion for a bill of particulars relating to the object offenses, filed concurrently herewith.

"enterprise of persons" and the "common criminal purpose" thereof) is based on the Secretary's *ultra vires* attempt to expand the definition of the term "conspiracy" to include conduct not punishable as such. Accordingly, this language should be stricken under RMC 906(b)(3).

4. **Burdens of Proof and Persuasion:** This motion presents a question of law. As it pertains to the Military Commission's subject matter jurisdiction over the conduct alleged in Charge III, the burden of persuasion is on the government.

5. **Facts:** The following facts relating to the procedural history of the case are germane:

a. The President signed the MCA into law on October 17, 2006. P.L. 109-366, 120 Stat. 2600.

b. The Secretary of Defense issued the MMC on or about 18 January 2007.

c. Charges were initially sworn against Mr. Khadr on 2 February 2007 and referred for trial by this Military Commission on 24 April 2007. (*See* AE 001.)

6. **Argument: The Military Commission should strike language from Charge III alleging that Mr. Khadr joined an "enterprise of persons sharing a common criminal purpose" as surplusage**

a. Conspiracy does not mean an "enterprise of persons sharing a common criminal purpose" and the Secretary's statement to the contrary is of no effect

(1) The MCA proscribes the offense of "conspiracy." MCA § 950v(b)(28) provides:

> Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished . . . as a military commission under this chapter may direct.

(2) Aside from narrowing the scope of the offense (as discussed below), the MCA definition of conspiracy tracks the analogous provision of the Uniform Code of Military Justice (UCMJ). Article 81 thereof provides:

> Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

10 U.S.C.S. § 881(a) (2007).

(3) The term "conspiracy" is not new, either to military law or the criminal law generally. It is well understood as "agreement to violate the law." *United States v.*

Blankenship, 970 F.2d 283, 285 (7th Cir. 1992). As stated by the Supreme Court, "[t]he gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *United States v. Falcone*, 311 U.S. 205, 207 (1940). "The essential element of the offense of conspiracy is that there is an agreement with one or more persons to commit a criminal act." *United States v. Jones*, 36 M.J. 778, 779 (A.C.M.R. 1993); *see also United States v. Pretlow*, 13 M.J. 85, 88 (C.M.A. 1982) ("Conspiracy is an offense requiring an agreement between two or more persons to commit *another* offense recognized by the Uniform Code of Military Justice and the doing of an act to effect the agreement.").

(4) There is no reason to believe that in using the term "conspiracy" in MCA § 950v(b)(28), Congress meant something other than what it meant in using the same term in the UCMJ (or the federal criminal code). *Cf.* 18 U.S.C.S § 371 (2007). That conclusion is reinforced here by three specific considerations: First, aside from mandating that the overt act be performed by the accused, Congress defined the offense the same way it defined it in the UCMJ: an "agreement" and an over act done in furtherance of the agreement. Second, Congress set out to create a system "based upon" court-martial practice. *See* MCA § 948b(c). Third, in enacting the MCA, Congress amended the provision of the UCMJ punishing conspiracy to make it an offense for any person subject to the code to conspire with any other person (presumably, given the context of the amendment, an unlawful enemy combatant) to commit an offense under the law of war. *See* MCA § 4 (amending 10 U.S.C. § 881 to include new subsection (b)). There is no reason to think that Congress would have intended the anomalous result of a situation in which two individuals could be found guilty of different substantive conduct as part of the same conspiracy.

(5) The elements of the offense of conspiracy are (and have been for years) accurately described in the Manual for Courts-Martial (MCM):

> (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
>
> (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

See ¶ 5b, Part IV, MCM (2005).

(6) Notwithstanding the plain and unambiguous meaning of the word "conspiracy," and the language of the statute, in setting forth the elements of the offense in the MMC, the Secretary of Defense describes conspiracy as follows:

> (1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission *or otherwise joined an enterprise of persons who shared a common criminal purpose that*

involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement *or the common criminal purpose of the enterprise* and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement *or enterprise*.

See ¶ 5(28), Part IV, MMC (2007) (emphasis added).

(7) The highlighted language is not an accurate statement of the elements of the offense of conspiracy. Whatever else joining an "enterprise of persons who shared a common criminal purpose" may be, it is not the offense of conspiracy.[2]

(8) The Secretary may not make it so by fiat. In issuing the MMC, the Secretary cannot contradict the MCA anymore than the President can contradict the UCMJ in issuing the MCM. *Compare* MCA § 949a(a) *with* 10 U.S.C. § 836(a). Military courts have long held that the President cannot, through regulation, trump the provisions of the UCMJ. *See generally United States v. Gonzalez*, 42 M.J. 469, 474 (1995); *United States v. Mance*, 26 M.J. 244, 252 (1988); *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000); *United States v. McFadden*, 19 U.S.C.M.A. 412, 42 C.M.R. 14 (1970); *United States v. Johnpier*, 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961); *United States v. Ware*, 1 M.J. 282, 285 n.11 (C.M.A. 1976).

(9) As with the MCM in the court-martial setting, the MMC cannot be "contrary to or inconsistent with" the MCA. *See* MCA § 949a(a). To the extent the MMC articulates a definition of "conspiracy" inconsistent with the plain and unambiguous meaning of the language of the statute, the statute must prevail. The "elements" of conspiracy are what they are as stated *by Congress* in MCA § 950v(b)(28): "agreement" to commit an offense or offenses and an "overt act" in furtherance thereof. The Secretary's attempt to enlarge the plain meaning of the word "conspiracy" by regulation must therefore fail.

(10) The government can be expected to defend the MMC provision based on MCA § 949a(a)'s general delegation of rule-making authority because Congress included the term "elements" in that section. Such reliance would be misplaced. It goes without saying that the Constitution vests "all legislative Powers" in Congress. *See* U.S. Const. art. I, § 1. This is a power Congress may not delegate. *See Loving v. United States*, 517 U.S. 748, 772 (1996) ("Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes."). And Congress could not, consistent with the Constitution, provide the Secretary with power to criminalize conduct as "conspiracy" that is simply not embraced by that term.

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[2] *See Agency Holding v. Malley-Duff*, 483 U.S. 143 (1987) (stating that the legislative history reveals that RICO imported concepts of liability into the criminal law from anti-trust law). "RICO is designed to remedy injury caused by a pattern of racketeering, and '[c]oncepts such as RICO "enterprise" and "pattern of racketeering activity" were simply unknown to common law.'" *Id*. At 150.

(11) This, however, is a Constitutional issue that is easily avoided and should be avoided by this Commission. *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991) ("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."). In view of the accepted practice whereby the President issues a manual describing the elements of offenses under the UCMJ (subject to the ultimate authority of the code), there is no reason to presume that Congress intended anything other than to allow for a similar practice in military commissions, i.e., Congress anticipated that the Secretary would issue a manual that *accurately* stated the elements of the offenses prescribed by Congress. That the Secretary inaccurately described those elements does not mean that his error becomes law.

(12) There is no reason to believe that Congress intended to widen the scope of conspiracy to include "enterprise" crimes. Indeed, the evidence is to quite the contrary. In proscribing conspiracy under the MCA, Congress actually *narrowed* the scope of liability under the statute. MCA § 950v(b)(28) mandates that in order to be guilty of conspiracy, the *accused* must commit an overt act in furtherance of the agreement. In contrast, Article 81 of the UCMJ allows an accused to be convicted based on the overt act of a co-conspirator. *See* 10 U.S.C.S § 881(a). Congress' *narrowing* of the definition of conspiracy to focus on the conduct of the accused significantly undermines any suggestion that Congress intended to widen the scope of liability under the statute based on the acts of others.

b. Surplus language relating to an "enterprise" should be stricken because it creates a risk that Mr. Khadr will be convicted of conspiracy without the government having actually proven the offense

(1) Based on the Secretary's *ultra vires* definition of "conspiracy," in the sole specification of Charge III, the government has alleged that in addition to conspiring with named individuals to commit a number of object offenses, Mr. Khadr did the following:

> willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States; said . . . enterprise sharing a common criminal purpose known to the accused[.]

(2) This language is surplusage and should be stricken under R.M.C. 906(b)(3). The Discussion accompanying that provision states that "[s]urplusage may include irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the offense." This accurately describes the "enterprise" language in Charge III. But it is not merely irrelevant. Its presence increases the likelihood that Mr. Khadr will be erroneously convicted of "conspiracy" without the government having actually established the elements of the offense.

(3) While Mr. Khadr's joining of an "enterprise" with a "common criminal purpose" may in some way describe the government's *evidence* in support of the specification of

Charge III, it does not mean that these are the "elements" of the offense of conspiracy. And proof thereof cannot relieve the government of its burden to prove that the accused entered into an agreement to commit some particular offense or offenses. Yet this is the likely effect of this language.

(4) It is not difficult to see how this might happen. Mr. Khadr is alleged to have conspired with certain named individuals and joined the "enterprise" in June and July of 2002. It is alleged that the "enterprise" engaged in certain conduct before Mr. Khadr joined. As an initial matter, Mr. Khadr obviously could not have conspired with the named individuals in 2002 to commit offenses in 1998, 2000, and 2001 (i.e., in the past). However, based on nothing more than evidence that the "enterprise" was responsible for those offenses (which generally constitute, according to the MCA, the object offenses of "attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism"), the members could infer that the "enterprise" had a "criminal purpose" to do similar things in the future. In the view of the MMC, this would be sufficient, even if the government failed to offer a shred of evidence to show that Mr. Khadr conspired to commit any particular offense or offenses following his "joining" of the "enterprise." Thus, Mr. Khadr could be convicted of "conspiracy" based exclusively on the past conduct of others, without the government demonstrating that Mr. Khadr participated in any agreement whatsoever to commit any actual offense after June/July of 2002. In such circumstances, he would not be guilty of conspiracy, only associating with an "enterprise" that had committed certain offenses in the past. Whatever this conduct may be described as, it is most certainly not the offense of "conspiracy" to commit a particular offense or offenses under the MCA, and there is no reason to believe that Congress intended to proscribe such conduct in MCA § 950v(b)(28).

c. Conclusion

(1) In the sole specification of Charge III, the government alleges that Mr. Khadr conspired with certain named individuals to commit various object offenses. Either the government's evidence will support the charge or it will not. The government cannot relieve itself of the obligation to establish the elements of the offense of "conspiracy" by redefining the term to embrace a distinct offense of "joining a criminal enterprise" and proving that offense instead. The surplus language identified herein should therefore be stricken from Charge III's specification.

7. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h). Oral argument will assist the Court in understanding and resolving the complex legal issues presented by this motion.

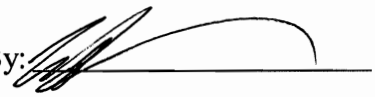
8. **Witnesses and Evidence:**

A. Charge Sheet.

9. **Certificate of Conference:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. **Attachment:** None.

By: 

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**D 19** **GOVERNMENT'S RESPONSE** **To the Defense Motion to Strike Surplus Language from Charge III** January 18, 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense Motion to Strike Surplus Language from Charge III should be denied.

3. Overview: The language in the Prosecution's charge sheet in the instant case, specifically in regard to the "enterprise of persons" language, is per se relevant as the language represents valid elements of the Conspiracy charge. The language citing "al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, that attack against the U.S.S Cole in October 2000, and attacks on the United States..." are all facts pertinent to the criminal conduct alleged in the charges and are properly plead. As the Manual for Military Commissions (MCM) states that the specification may be in any format,[1] and the language in Charge III is properly plead, the Defense motion should be denied.

4. Burden and Persuasion: The government does not agree with the Defense assertion that this is a challenge to the subject matter jurisdiction of the military commission. As the accused is charged with Conspiracy, and the defense is not challenging the subject matter jurisdiction of the crime of Conspiracy *in this motion*, this motion is simply an attempt to litigate the proper elements of an offense and the propriety of certain language contained within a specification. Such a motion is not considered to be a motion to dismiss for lack of jurisdiction, therefore the burden of persuasion resides with the Defense as the moving party. See MCM 905(c)2(B).

[1] See MCM Rule 307(c)(3).

5. Discussion:

The "enterprise of persons" is a valid theory of liability under the Military Commissions Act and conspiracy law

a. A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group' bound together and organized for a common purpose."

-The International Military Tribunal at Nuremberg, Judgment, pg 499 (30 Sept 1946).

b. The defense moves this Military Commission to strike the following language from Charge III: "and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania, the attack against the USS Cole in October 2000, the attacks on the United States;" and "an enterprise sharing a common criminal purpose known to the accused." The defense motion should be denied.

c. The Military Commissions Act of 2006 ("MCA") states that a person subject to trial by military commission may be charged with Conspiracy if he "conspires to commit one or more substantive offenses triable by military commission, and if he knowingly does any overt act to effect the object of the conspiracy." See 10 U.S.C. §950v(b)(28). The Military Commissions Act does not define the elements of Conspiracy, leaving that task instead to the Secretary of Defense (The "pretrial, trial, and post-trial procedures, *including elements* and modes of proof, for cases triable by military commissions may be prescribed by the Secretary of Defense, in consultation with the Attorney General). See id. §949a(a) (*Emphasis added*).

d. The Military Commissions Act further states that such procedures shall, so far as practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial at general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with the Military Commissions Act. Id. Despite the assertions of the Defense, the elements of Conspiracy, specifically in regard to the elements "or otherwise joined an enterprise of persons who shared a common criminal purpose and that the accused knew the common criminal purpose of the enterprise, and joined willfully, that is, with the intent to further the unlawful purpose," as listed by the Manual for Military Commissions, are neither contrary to, nor inconsistent with, the Military Commissions Act. The above-described conduct fits well within established principles of conspiracy law, and, furthermore, is a well-recognized theory of liability under international law for crimes committed during wartime.

e. The Manual for Military Commissions lists the following elements for the Offense of Conspiracy:

> i. The accused entered into an agreement with one or more persons to commit one or more substantive offense triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;
>
> ii. The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and
>
> iii. The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

10 U.S.C. §950v(28).

f. If one were to join an enterprise of persons who shared a common criminal purpose that involved the commission or intended commission of one or more substantive offenses, knowing the common criminal purpose of the enterprise, and joined willfully with the intent to further the unlawful purpose of the enterprise, he could be found guilty of conspiracy under the standard definition reflected in Manual for Court Martial and 18 U.S.C. 371, both of which were cited by the defense as properly defining Conspiracy. This would be the case even if the accused committed no overt acts in furtherance of the objective of the enterprise.[2] A simple comparison of the relevant principles contained in the explanation section in Article 81 Conspiracy charge of the UCMJ, when juxtaposed with how the "enterprise of persons" language comports with the explanation section of Conspiracy under Article 81 of the UCMJ, requires this conclusion:

> i. Explanation for Conspiracy in UCMJ for Article 81: Two or more persons are required to have a conspiracy.
>
> **The MCA requires the accused join an enterprise of *persons*.[3] (plural).**

[2] This presumes that one of the other co-conspirators did at least one overt act in furtherance of the Conspiracy.

[3] Of import, the government is not alleging that he joined a legal entity, such as a corporation or a government, but rather an enterprise of *persons*.

ii. Explanation in Conspiracy in UCMJ for Article 81: Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established.

> **Members of an enterprise of persons, such as al Qaeda in the instant case, often do not know every other member of the enterprise, or their particular connection to the group, but this is clearly not required under conspiracy law.**

iii. Explanation in UCMJ: The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

> **The MCA requires the enterprise of persons to *share* a common criminal purpose, and also requires that the accused *know the purpose* of the enterprise and *join willfully, with the intent to further the unlawful purpose.* To the extent the enterprise of persons shares a common criminal purpose, and the accused knows the purpose and joins with the intent to further the unlawful purpose, this constitutes evidence of an "agreement."**

g. Of course, as with any conspiracy, the accused's conduct, as manifested in his overt act(s), can serve as proof of his knowledge of the common criminal purpose of the enterprise, the accused's agreement with the purpose of the enterprise, and the fact that the accused willfully joined the enterprise (i.e., the conspiracy). Conspiracy law does not require that the accused walk up to Usama bin Laden and the other named co-conspirators, shake theirs hands, and tell him that he is in agreement with his desire to attack Americans to constitute the "agreement."

h. The Defense concedes in its filing that Congress, in the Military Commissions Act, altered the traditional notion of Conspiracy, at least insomuch as it is defined under Article 81 of the Manual for Courts-Martial, when it required the accused himself, and not just any of his co-conspirators, to commit an overt act.[4] While the defense contends that, in doing so, Congress simply intended to "narrow the definition" of Conspiracy, the defense ignores any notion that this additional requirement of an overt act done by the accused was done to reflect international law principles in regard to criminal enterprise liability.

i. While it is true, as the defense contends, that Congress set out to create a system "based upon" court-martial practice, the defense assertion that this intention leads, *ipso*

[4] See Def. Motion at 3.

facto, to the conclusion that Conspiracy under the Manual for Military Commissions must have the exact same elements as Conspiracy in the Manual for Courts-Martial ignores the fact that many of the offenses triable by military commissions have unique international law aspects not contemplated by offenses listed in the Manual for Courts-Martial. The Manual for Courts-Martial does not purport to list or codify all of the offenses traditionally triable by military commission or the law of war.

j. One example of how the MCA differs from principles of law in trial by general court-martial, despite being "based upon" court-martial practice, is 10 U.S.C. §950q. Section 950q, like the MCM, states that any person is punishable as a principal if he commits the offense, or by aiding, abetting, counseling, commanding or procuring its commission, or by causing an act to be done which if directly performed by him would be punishable under this chapter. See 10 U.S.C. §§950q(1) & 950q(2)). However, the MCA also adds the principle of liability for a superior commander who, with regard to acts punishable under the MCA, "knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or the punish the perpetrators thereof." No such theory of liability exists under the Manual for Courts-Martial, despite the fact that Congress "intended" for the MCA to be "based upon" Court Martial practice. Instead, there exists a clear recognition in both the MCA and the MCM of principles of law recognized specifically within a law of war context, based on both contemporary international law in recent international criminal tribunals, as well as common law of war decisions after World War II (to be discussed below). The same may be said for Conspiracy as a violation of the law of war and the "enterprise of persons" liability under the MCM, even if not explicitly spelled out by Congress in the MCA.

k. The defense's claim that the Secretary of Defense inaccurately stated the elements of Conspiracy, and that Congress could have only meant what it meant in using the same term in the UCMJ and the Federal Criminal Code, misapprehends both international law and the Federal Code. While the defense cites to 18 U.S.C. §371 as an example of a Conspiracy charge under Federal Law with the same elements as Conspiracy under the UCMJ, it fails to mention that there are at least four[5] other Conspiracy charges under the Federal Code that have different elements based on the fact that they have no overt act requirement at all, for any of the co-conspirators.[6] For the defense to suggest that Conspiracy has *only* one definition that has been "accurately" described "for years" in the MCM is just flat wrong. Such a statement fails to recognize that conspiracy charges are, at times, specifically tailored to combat the specific ill it is intended to address (i.e. by removing an element such as the overt act when the meeting of the minds should be punished regardless of whether any overt act in furtherance of the agreement takes place). The same can be said for combating conspiracies in a war-time setting.

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[5] See 18 U.S.C §372 Conspiracy to impede or injure any Federal officer in the discharge of his duties; 18 U.S.C. §241 Conspiracy against Civil Rights 1956(h); and drug conspiracies under 21 U.S.C. §846 and 21 U.S.C. §963 for examples of conspiracies with no overt act requirement. *See also* UCMJ Article 81c (9) mandating that these crimes require charging under Article 134 (The Federal Assimilative Crimes Act) as they differ in the elements in comparison to UCMJ Article 81 Conspiracy.

l. In a wartime context, when a nation is engaged in armed conflict with an unlawful international terrorist organization that functions more like an army than a small, readily ascertainable group of individuals, the Secretary of Defense should be given great deference in his choice of elements, providing those elements fit squarely within the principles of Conspiracy law, which they do. The elements the Secretary of Defense set forth in the Manual for Military Commissions are consistent with the Military Commissions Act, consistent with military activities the Secretary is charged with overseeing[7] (which includes prosecuting a war against an international terrorist organization), and consistent with theories of liability under international law.

m. Examining the applicable principles of law and the inherent characteristics of many crimes perpetrated during wartime led the International Criminal Tribunal for the Former Yugoslavia (ICTY) to take the exact approach the Secretary of Defense did in finding that common criminal enterprise liability was *implicit,* even if not *explicit,* in its charter statute:

> i....[t]he Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design."

See The Prosecutor v. Dusko Tadic, Opinion and Judgment, Case No.: IT-94-1-T, Appeals Chamber, 15 July 1999, ¶189 International Criminal Tribunal for the Former Yugoslavia.

n. In determining that the charter statute for the ICTY contained *implicit* theories of liability, the *Tadic Court,* much like the Secretary of Defense did in the MCM, considered the very nature of international crimes committed during wartime:

> i. ...it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet[8] in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur ***where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.***
>
> ii. The above interpretation is not only dictated by the object and purpose of the Statute but is ***also warranted by the very nature of many***

[7] The Secretary of Defense has discretion to establish procedures are consistent with military activities. See 10 U.S.C. §949a(a).

[8] Although the two theories are similar, acting in pursuance to a common plan or design liability is not tantamount to aiding and abetting liability. For a full discussion on the difference between the two theories of liability, please see Tadic at ¶229.

> ***international crimes which are committed most commonly in wartime situations***. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: ***the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design***. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.
>
> iii...However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. ***To identify these elements one must turn to customary international law.*** Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation[9].

Id. at ¶193-194 (emphasis added).

o. There is admittedly a distinction between the Tadic decision and Conspiracy section in the Military Commissions Act. The Tadic court found liability for the ultimate substantive offenses because of sharing a common criminal purpose with others in the enterprise, whereas in the Military Commissions Act, the Conspiracy is the ultimate substantive act. Id. However, based on the arguments presented above, it is clear that the theory of prosecution is directly akin to conspiracy and joint enterprise liability as defined under the MCA and the MCM. Tadic at ¶206-213 citing The Essen Lynching Case *The Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals Volume I, 88 (United Nations War Crimes Commission, 1947).

p. From a practical perspective this is a matter of little import. It appears that Conspiracy, as listed in the MCM merely reflects the more traditional approach which practitioners before Military Commissions are accustomed to (as well as others in common law jurisdictions). While there may be some differences, the underlying goal that is common to these offenses is the punishment of conspiring with others to effect a criminal objective when coupled with some action by the accused that advances that objective. ICTY's required proof of a "common plan" for criminal enterprise convictions is strikingly similar to the proof required for the "agreement" element in establishing a conspiracy. See Richard P. Barrett and Laura E. Little, Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. at 42.

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[9] For a full examination of the cases and international legislation considered by the *Tadic Court* in determining that criminal liability for joining an enterprise of persons was implicit in its charter statute, despite not being explicit in its terms, see Tadic, Opinion and Judgment, ¶189-228.

q. Because of the realities of waging war against these common criminal enterprises, their leaders may be killed, detained, go into hiding or blend back into the civilian population. As time goes on, people may start to fight only for the group itself, with little or no knowledge of the individuals who originally set in motion the common criminal purpose of the enterprise, or even the individuals who are now in command of the enterprise. There may be scenarios where an individual never even personally meets other members of the group, yet still joins the enterprise and furthers its purpose. To prove what specific people an accused "agreed" with may be difficult despite overwhelming proof of the accused's involvement in the common criminal enterprise.

r. Here, the accused is charged with conspiring with Usama bin Laden, Ayman al Zawahiri, and various other members and associates of the al Qaeda organization, known and unknown. The evidence at trial will show that these are two of the individuals who are the leaders and policymakers for the international terrorist enterprise known as al Qaeda, and who set forth al Qaeda's purpose to attack American civilians and service members worldwide in violation of several of the offenses authorized for trial by military commissions. The facts in the instant case will support, equally, that the accused conspired with the named co-conspirators as well as joined an enterprise of persons with a common criminal purpose due to his familiarity with the started intentions of Usama bin Laden and other al Qaeda leaders, as well as al Qaeda's criminal purposes as an enterprise. However, the issue of whether the enterprise theory of liability is a valid theory under conspiracy law, in a law of war context, must also consider the future scenarios where establishing proof of an agreement between a relatively small group of readily identifiable individuals may be difficult, despite strong proof that an individual joined an enterprise of persons who shared a common criminal purpose.

s. In a wartime setting, whether it is the threat the United States faces from al Qaeda now, or other criminal enterprises in the future, it is groups of individuals acting together and sharing a common criminal purpose to commit acts in violation of the laws of war that can exact the most damage, and who most threaten the underlying principles of the laws of war. These groups as a whole are more dangerous than the sum of their individual participants, and to believe that knowing and willful participation in such a group falls outside of the realm of what any conspiracy law seeks to punish is to misunderstand conspiracy law in its entirety.

t. The defense's claim that the accused could be convicted of conspiracy based exclusively on the past conduct of others, without the government demonstrating that the accused participated in any agreement whatsoever to commit any actual offense after June/July 2002 is simply a misstatement of the law. While the fact that an enterprise had committed certain offenses in the past may help establish the common criminal purpose of the enterprise, and may also help establish the accused's knowledge[10] of the common criminal purpose of the enterprise, the government must still further prove, beyond a reasonable doubt, that the accused knew of the common criminal purpose of the enterprise, and that he joined the enterprise willfully, with the intention to further the goals of the common criminal enterprise, and that he also committed an overt act in order

[10] To the extent the accused as aware that this enterprise of persons had committed the attacks.

to accomplish some objective or purpose of the enterprise. While such proof logically leads to the legal and factual conclusion that he "agreed' with the enterprise of persons under either theory of liability, the burden the Prosecution has in the Conspiracy charge under the enterprise theory of liability is a far cry from "convicting the accused based exclusively on the past conduct of others, without the government demonstrating that the accused participated in any agreement whatsoever to commit any actual offense."

t. It is important to note that the prosecution is **not** alleging that the MCA authorizes trial for a separate offense of joining a common criminal enterprise, but rather asserts only that knowingly and willfully joining a common criminal enterprise is a valid theory of liability which one could be found under the express terms of the MCA, as well as under the traditional offense of Conspiracy. Membership in such a group is **not** sufficient, on its own, to establish guilt under the Conspiracy charge. The common criminal enterprise is, of course, **not** a status crime. The common criminal enterprise elements of the Conspiracy charge clearly require that the accused know of the common criminal purpose of the enterprise of persons, that he join it with the intent to further the unlawful purpose of the enterprise, and that he knowingly commit an overt act in order to accomplish some objective or purpose of the enterprise. All of these requirements square with traditional conspiracy doctrine, as well as the pervading desire of international law to assign individual responsibility for crimes committed of the most serious magnitude.

The Language cited by the Defense in Charge III is not Surplusage

u. The defense asks that allegedly surplus language relating to an "enterprise" be stricken because it creates a risk that Mr. Khadr will be convicted of conspiracy without the government having actually proven the offense. While the Prosecution has shown these concerns to be unfounded, the challenged language in the charge sheet is simply not surplusage. Surplusage is defined, at least in part, by the discussion under R.M.C. 906(b)(3), in that it includes irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the case.

v. The Defense has moved this Military Commission to strike the following allegedly surplus language from Charge III: "and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania, the attack against the USS Cole in October 2000, the attacks on the Unites States"; and "enterprise sharing a common criminal purpose known to the accused."

w. All of the details cited in the Prosecution's charge are relevant, in that they either describe valid elements of Conspiracy as set forth by the Secretary of Defense, or explain the essential facts of the case. The language in the Prosecution's charges in the instant case, specifically in regard to the enterprise language, is per se relevant as the language represents valid elements of the Conspiracy charge. The language "Al Qaeda, founded by Usama bin Laden in or about 1989" serves to allege the enterprise of persons the government is alleging the accused joined, which also happens to have been founded by

the Usama bin Laden who is also the first named co-conspirator. The three attacks cited by the Prosecution within the Conspiracy charge serve to show the existence of a Conspiracy[11] to Attack Civilians and Civilian Objects (for the attacks on the embassies and the attacks on the World Trade Center); Conspiracy to Commit Murder in Violation of the Law of War and Conspiracy to Destroy Property in Violation of the Law of War (all three attacks listed) and Conspiracy to Commit Terrorism (all three attacks listed). The three attacks cited in the charge also help explain the essential facts of the case in that the facts also establish the existence of an armed conflict between the United States and the international terrorist organization al Qaeda; a conflict which the laws of armed conflict govern. All of the aforementioned reasons are directly relevant to the underlying offenses and are all facts pertinent to the criminal conduct alleged in the charges. Therefore, the language does not constitute surplusage. Accordingly, the Defense motion should be denied.

6. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the motion to dismiss should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

7. Witnesses and Evidence: None.

8. Certificate of Conference: The Defense conferred with the Prosecution regarding the requested relief and the Prosecution objected.

9. Additional Information: None.

10. Submitted by:

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[11] The existence of a Conspiracy under both theories of liability "an agreement between one or more persons...and an enterprise of persons who shared a common criminal purpose."